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Supreme Court, U.S.
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In the

Supreme Court of the United States

RONDOUT ELECTRIC, INC.,

Petitioner,

v.

NYS DEPT. OF LABOR, LINDA ANGELLO, CHRISTOPHER ALUND, Dir., Bureau of Public Work, New York State Department of Labor and ELIOT L. SPITZER, Attorney General of the State of New York,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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94 pp

QUESTION PRESENTED

Is a state regulation that dictates the benefits that a contractor must pay to its employees for work performed on privately owned construction projects preempted by the National Labor Relations Act, 29 U.S.C.S. §151 et seq., pursuant to the *Machinists* doctrine as enunciated in *Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), and its progeny, and, therefore, unconstitutional under the Supremacy Clause, Article VI, Clause 2 of the United States Constitution?

PARTIES TO THE PROCEEDING

The parties are fully set forth in the caption. Rondout Electric, Inc., Petitioner herein, has no parent, subsidiary or affiliate corporation. No publicly held company owns 10% or more of Rondout Electric, Inc.'s stock.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at 335 F.3d 162 (2nd Cir. 2003) and is set forth in the Appendix at 1a – 15a. The Decision of the United States District Court for the Southern District of New York is unreported and is contained in the Appendix at 16a – 28a.

JURISDICTION

On July 15, 2003, the United States Court of Appeals for the Second Circuit entered an order and judgment reversing the judgment of United States District Court for the Southern District of New York dated July 22, 2002.

This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS

United States Constitution, Article VI, Clause 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

New York State Labor Law §220 – set forth in the Appendix at 29a – 50a.

New York State Labor Law §220-b – set forth in the Appendix at 51a – 65a.

12 N.Y.C.R.R. §220.2 Contribution and computation of supplements

> (a) For the purposes of subdivision 3 of section 220 of the Labor Law, supplements shall include the amount of:
>
> (1) any contribution irrevocably made by a contractor or subcontractor on behalf of laborers, workers and mechanics to a fund, plan or program to provide supplements; and
>
> (2) the cost to the contractor or subcontractor which is actually incurred in providing the supplements not covered by paragraphs (1) of this subdivision to laborers, workers and mechanics, provided such supplements are enumerated in the current annually determined prevailing wage rate schedule promulgated by the Commissioner of Labor for the applicable trade or occupation in the locality.
>
> (b) Any portion or all of the supplement obligations of a contractor or subcontractor may be satisfied by paying to the laborers, workers and mechanics affected in cash with the regular weekly wages, the cost of such supplement(s) as contained in the current annually determined prevailing wage schedule.

(c)

(1) An employer must furnish to the Commissioner of Labor, upon request, within 10 days, proof of any supplements provided or amounts paid to or on behalf of its employees in satisfaction of its obligation to provide prevailing supplements.

(2) If an employer provides any supplement which is part of a fund, plan or program as set forth in paragraph (a) (1) of this section, it must furnish to the Commissioner of Labor, upon request, within 10 days, proof that the supplement is provided through a fund, plan or program and the amount contributed on the employees' behalf to such fund, plan or program.

(3) The failure of an employer to provide the Commissioner of Labor with proof of any prevailing supplements paid or provided to or on behalf of its employees shall result in an investigatory finding that supplements were not paid or provided in violation of the second unnumbered paragraph of subdivision 3 of section 220 of the Labor Law.

(d) To determine the hourly cash equivalent of any applicable supplement provided to or on behalf of laborers, workers and mechanics employed upon public works projects in accordance with

subdivision (a) of this section, the Commissioner of Labor will:

(1) divide the actual contribution or cost for providing such supplement by the total annual hours worked on both public and private work, where such proof is provided to the Commissioner of Labor by the employer;

(2) divide the actual annual contribution or cost for providing such supplement by 2080 hours (8 hours per day x 5 days per week x 52 weeks), where proof of the total annual hours worked by the employees on both public and private work is not provided to the Commissioner of Labor by the employer;

(3) divide the actual annual contribution or cost for providing such supplement by 1820 hours (7 hours per day x 5 days per week x 52 weeks), where proof of the total annual hours worked by the employees on both public and private work is not provided to the Commissioner of Labor by the employer but proof is provided establishing that the employees worked only 7 hours per day (excluding meal periods).

STATEMENT

Underlying Jurisdiction in the District Court

Pursuant to 28 U.S.C.S. §1331, the District Court had original jurisdiction over this action because the claims arise under the Constitution, laws, or treaties of the United States.

Introduction

The Petitioner, Rondout Electric, Inc. submits this petition seeking a writ of certiorari to review the July 15, 2003 decision of the United States Court of Appeals for the Second Circuit (the "Second Circuit") which held that 12 N.Y.C.R.R. §220.2(d)(1) is not preempted by the National Labor Relations Act, ("NLRA"), 29 U.S.C.S. §151 et seq. under the *Machinists* doctrine, because it is a minimum substantive labor standard.

The Petitioner contends that the regulation is preempted by the NLRA because it effectively requires non-union contractors who provide labor on public works projects in the Sate of New York to pay prevailing wage supplements, as determined by the New York State Department of Labor, to their employees for the work they performed on private projects.

The Petitioner files this Petition because (a) the Second Circuit's decision conflicts with decisions of the United States Supreme Court and the United States Court of Appeals for the Ninth Circuit; and (b) the Second Circuit's decision is a matter of public importance in that it effectively allows a state to dictate the wages and benefits that a contractor must pay to its

employees for work performed on privately owned construction projects.

Background Facts

A. The Prevailing Wage Law

New York Constitution Article I, §17 provides that "[n]o laborer, workman, or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work shall... be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used." New York Labor Law §220 implements this constitutional provision by requiring contractors and subcontractors to pay their employees for work performed on public projects the prevailing wage as determined by the Commissioner of Labor. *See* Labor Law §§220(3), (5)(a) – (5)(c), Appendix at 31a – 33a, 38a – 40a. The prevailing wage not only encompasses hourly wages, but also includes supplements such as health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training. *See* Labor Law §§220(3), (5)(b), Appendix at 31a – 33a, 38a – 39a; *Burgio and Campofelice, Inc. v. New York State Department of Labor*, 107 F.3d 1000, 1003 (2nd Cir. 1997).

Pursuant to Labor Law §220, the Commissioner of Labor is responsible for ascertaining and determining the rate for prevailing wages and supplements for public work by reference to the collective bargaining agreements negotiated by labor unions and union contractors with respect to private work in the area where the public work is to take place, provided the

agreement covers at least thirty percent of the workers in the same trade or occupation in that particular area. *See* Labor Law §§220(3), (5)(a), (5)(c), Appendix at 31a – 33a, 38a – 40a; *Burgio*, 107 F.3d at 1003.

The Commissioner of Labor is also responsible for enforcing the prevailing wage laws. *See* Labor Law §§220(3), (7), (8), Appendix at 31a – 33a, 43a -46a; Labor Law §220-b(2)(a), Appendix at 52a – 53a. If the Commissioner of Labor determines that prevailing wages or supplements "appear to be due" from a contractor or subcontractor to an employee, then she must direct the public entity owing money to the contractor to withhold payment in an amount sufficient to satisfy the prevailing wages and/or supplements – plus interest at a rate of 16% per annum on the underpayment, and a civil penalty up to 25% of the underpayment pending a formal investigation, administrative hearing, and final determination. *See* Labor Law §§220(7), (8), Appendix at 43a -46a; Labor Law §220-b(2)(a), (2)(c), Appendix at 52a -55a. In addition, Labor Law §220-b(3)(a) precludes a contractor from submitting bids on public projects for a period of five years if the Commissioner of Labor finds twice in a six-year period that the contractor willfully failed to pay prevailing wages or supplements; and Labor Law §220(3) holds any person who fails to pay prevailing wages or supplements guilty of a misdemeanor.

B. The Annualization Regulation

12 N.Y.C.R.R. §220.2 sets forth the New York State Department of Labor's ("Respondent") regulations with respect to the computation and contribution of prevailing wage supplements. A contractor may satisfy its obligation to pay prevailing wage supplements to

laborers, workers, and mechanics employed on a public project by paying the cash equivalent of the applicable supplements into a qualified plan under the Federal Employee Retirement Income Act ("ERISA"), 29 U.S.C.S. §1000 et seq., by paying the cash equivalent of the applicable supplement into a non-ERISA plan, or by paying the applicable supplements to the employee in cash, or by any combination of the three methods, as long as the total payment is not less than the total prevailing wage supplements within the locality as determined by the Commissioner of Labor pursuant to Labor Law §§220(5)(a) and (5)(c). *See* 12 N.Y.C.R.R. §220.2(a), (b); *see also HMI Mechanical Systems, Inc. v. McGowan*, 266 F.3d 142, 147 (2nd Cir. 2001).

12 N.Y.C.R.R. §220.2(d)(1) (the "annualization regulation") contains the Respondent's annualization regulation and directs the Commissioner of Labor to determine the hourly cash equivalent of any applicable supplement paid on behalf of laborers, workers, and mechanics employed on a public project into an employee benefit plan, by dividing the actual contribution or cost of providing such supplement by the total annual hours worked on both public and private work. *See* 12 N.Y.C.R.R. §220.2(d)(1); *see also HMI*, 266 F.3d at 145, 151. The annualization regulation is designed to discourage contractors from paying supplements on behalf of public works employees into an employee benefit plan that also provides benefits to the employees or other employees for private work – a practice commonly known as "pooling" – thereby diluting the value of the supplements paid into the plan on behalf of the public works employees. *See HMI*, 266 F.3d at 146, 151. Although the annualization regulation is supposed to further the State's primary interest in equalizing competitive bidding on public projects by

requiring union and non-union contractors to pay the same prevailing benefits, *see Action Electrical Contractors Company, Inc. v. Goldin*, 64 N.Y.2d 213, 222 (1984); *see also Burgio*, 107 F.3d at 1003; *General Electric Company v. New York State Department of Labor*, 891 F.2d 25, 28 (2nd Cir. 1989), the real impact of annualization is to improperly regulate the playing field between union and non-union contractors on private projects.

While the non-union contractor can arguably avoid annualization by paying the prevailing supplements in cash as part of the employee's weekly wages, *see* 12 N.Y.C.R.R. §220.2(b), the contractor must also pay social security taxes ("FICA") and insurance premiums on the added payroll, thereby increasing the contractor's cost of doing business and tipping what is supposed to be a level playing field decisively in favor of union contractors, who are not required to pay FICA and additional insurance on contributions to a union benefit plan. More importantly, the employee must pay income taxes on the cash payments, which effectively dilutes the real value of the supplements and deprives the employee of the long term advantages of a tax-deferred benefit plan. As the District Court correctly found, the annualization regulation violates the *Machinists* doctrine because it improperly influences and intrudes upon the substantive terms over which private parties bargain and contract by effectively dictating the benefits that the non-union contractor must pay its employees for private work. *See* Appendix at 27a – 28a.

C. Application of the Annualization Regulation to the Petitioner

Petitioner has been a non-union, open shop electrical contractor since it was incorporated in 1962. It employs 75 non-union electricians. Approximately 50% of Petitioner's work is on public projects and 50% is on private projects. *See* Appendix at 2a.

Since January 1, 1996, Petitioner has maintained a "Prevailing Wage Pension and Annuity Plan" (the "prevailing wage plan") for the benefit of its laborers, workers, and machinists employed on public projects. A person is eligible to participate in the prevailing wage plan if he or she works for Petitioner during the plan year on a public project. For each hour during the plan year that an eligible employee works on a public project, Petitioner contributes to the prevailing wage plan solely for the benefit of that employee an amount equal to the prevailing supplement specified by the Commissioner of Labor. Each eligible employee has a self-directed individual account within the prevailing wage plan where Petitioner deposits the prevailing supplements earned by the employee, which vests immediately. *See* Appendix at 4a-5a.

Petitioner also maintains a 401(K) pension plan for wages earned by its employees on private projects, and provides full health insurance coverage to its employees at Petitioner's cost. Except for "rollover contributions," the prevailing wage plan prohibits Petitioner or the eligible employee from making any contribution to the employee's account other than the prevailing wage supplements earned by the employee on public projects. None of the contributions that Petitioner makes to an employee's account within the

prevailing wage plan are "pooled" to obtain benefits for individuals other than the eligible employee on whose behalf the payments were made. None of the contributions that Petitioner makes to an employee's account within the prevailing wage plan are "pooled" to obtain benefits for the employee during a period of time when he or she was employed on private projects. *See* Appendix at 19a.

From 1997 through 2000, Petitioner provided work, labor, and materials to the Monroe-Woodbury Central School District, the Village of Kiryas Joel, the Dover Union Free School District, and the Middletown Central School District with respect to separate public projects being performed by each of those entities in the State of New York. On each of the projects, Petitioner paid the prevailing supplements into each employee's account within the prevailing wage plan for each hour the employee worked on the projects. The contributions that Petitioner made to an employee's account were used solely for the benefit of the employee on whose behalf the payments were made, and none of the contributions were "pooled" to obtain benefits for other employees or otherwise used to obtain benefits for the employee during a time when he or she was employed on private projects.

On December 19, 2000, the Respondent issued four "Notices of Labor Law Inspection Finding" alleging that Petitioner underpaid its employees prevailing wages totaling $22,738.74 and supplements in the aggregate of $288,610.61 with respect to the public projects. The Respondent apparently used the annualization regulation set forth in 12 N.Y.C.R.R. §220.2(d)(1) to determine the amount of supplements allegedly due and owing from Petitioner to its

employees. The Respondent also issued four "Notices to Department of Jurisdiction to Withhold" pursuant to Labor Law §220-b(2)(a) directing (a) the Monroe-Woodbury Central School District to withhold payments due Petitioner on the Monroe-Woodbury project totaling $207,386.95 for the prevailing wages and supplements that Petitioner allegedly failed to pay its employees with respect to that project, plus two years interest at 16% per annum and a 25% penalty; and (b) Ulster County Community College to withhold payments due Petitioner on the Dover, Kiryas Joel, and Middletown projects totaling $305,766.11 for the prevailing wages and supplements that Petitioner allegedly failed to pay its employees with respect to those projects, plus two years interest at 16% per annum and a 25% penalty. *See* Appendix at 5a.

On February 8, 2002, the Respondent issued a Notice of Hearing and Designation of Hearing Officer scheduling administrative hearings for April 29, April 30, and May 1, 2002 with respect to its investigations, findings and directives to withhold monies due Petitioner. The notice modified the Respondent's previous findings and alleged that the total underpaid prevailing wages and supplements were $321,426.17, excluding interest and penalties. An administrative decision has not been rendered as of this date.

D. The Decisions of the Courts Below

The District Court found that the NLRA preempts the annualization regulation and therefore, the regulation is unconstitutional because it impermissibly dictates conduct in the private sector that Congress intended to be controlled by the "free play of economic forces," in violation of the *Machinists* doctrine as

articulated by the United States Supreme Court in *Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976) ("*Machinists*"), and its progeny. In contrast, the Second Circuit held that the annualization regulation established a minimum labor standard that did not affect the labor/management bargaining process and as such, the annualization regulation did not come within the sphere of *Machinists* preemption under the NLRA.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE THE SECOND CIRCUIT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Supremacy Clause of the United States Constitution provides that the "Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding." U.S. Constitution, Article VI, §2, cl. 2. State law is preempted under the Supremacy Clause if it conflicts with federal law or frustrates the federal scheme, or if from the totality of the circumstances Congress sought to exclusively occupy the field in which the state has acted. *See Building and Construction Trades Council of the Metropolitan District v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224

(1993) ("*Boston Harbor*"); *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 747-748 (1985) ("*Metropolitan Life*"). The NLRA, the federal statute in issue herein, does not contain an express preemption provision, however, the Supreme Court has recognized two preemption doctrines. *See Boston Harbor*, 507 U.S. at 226-227. The first, known as *Garmon* preemption, prohibits state action that regulates activities that are either arguably protected under Section 7 of the NLRA or constitute an unfair labor practice under Section 8 of the NLRA. *See San Diego Building Trades Council, Millmen's Union, Local 2020 v. J.S. Garmon*, 359 U.S. 236, 244 (1959); *Boston Harbor*, 507 U.S. at 224-225. The second, known as *Machinists* preemption, prohibits state regulation of conduct that Congress intended to be left to the free play of economic force. *See Machinists*, 427 U.S. at 140, 147 (1976); *see also Boston Harbor*, 507 U.S. at 225-226; *Chamber of Commerce of the United States v. Bragdon*, 64 F.3d 497, 499 (9th Cir. 1995). The annualization regulation at issue herein implicates *Machinists* preemption.

The *Machinists* doctrine preempts regulations that "influence ... the substantive terms on which ... parties contract." *Machinists*, 427 U.S. at 153 (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 490 (1960)). However, the United States Supreme Court has recognized two exceptions to the doctrine: First, a state may dictate labor standards without running afoul of NLRA preemption if the state is acting as a proprietor or market participant. *See Boston Harbor*, 507 U.S. at 227. Second, the NLRA does not preempt a state from establishing minimum substantive labor standards that are consistent with the legislative goals of the NLRA. *See Metropolitan Life*, 471 U.S. at 757. The Second Circuit held that the annualization regulation constitutes a

minimum labor standard and therefore, is not preempted by the NLRA.[1]

A. The Second Circuit's decision conflicts with decisions of the United States Supreme Court regarding the breadth of the NLRA.

In addressing the annualization regulation, the Second Circuit held that "[u]nlike the NLRA, the annualization regulation is not 'designed to encourage

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[1]The Second Circuit never reached the issue of whether the RESPONDENT is acting as a market participant in enacting the annualization regulation. Had the court reached this issue, it should have concluded that the RESPONDENT's actions under the annualization regulation go beyond those permitted by the market participant exception to *Machinists* preemption. In *Boston Harbor*, the United States Supreme Court held that a requirement on a public works project that all successful bidders abide by the terms of a project labor agreement was not a "regulation" subject to NLRA preemption because the state was acting as a purchaser of construction services in furtherance of its own financial interest. *See Boston Harbor*, 507 U.S. at 232-233; *see also Associated Builders and Contractors, Inc. v. City of Seward*, 966 F.2d 492, 495 (9th Cir. 1992).

The requirements in *Boston Harbor* and *Associated Builders*, however, were limited to the public projects in issue, hence, the public entities were market participants. In the present case, however, the RESPONDENT is not merely exercising its authority as a market participant with respect to publicly funded projects, but rather, it is effectively and improperly requiring non-union contractors who perform public work to pay their employees prevailing supplements for private work simply because the contractors have exercised their legal right to pay the prevailing supplements with respect to public work into an employee benefit plan. Thus, the RESPONDENT is acting as a regulator and not a market participant and its actions do not escape *Machinists* preemption.

or discourage employees in the promotion of their interests collectively.' Without some connection between the prevailing wage supplement and labor/management bargaining, the annualization regulation fails to come within the sphere of *Machinists* preemption under the NLRA." *See* Appendix at 12a. The Second Circuit's holding – that the NLRA only applies to instances that involve collective bargaining – is contrary to the prior holdings of the United States Supreme Court.

In *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, 475 U.S. 282 (1986) ("*Wisconsin*"), the United States Supreme Court held that the NLRA preempted a Wisconsin statute debarring certain repeat violators of the NLRA from doing business with the state. As in the present case, in *Wisconsin*, the statute did not directly implicate collective bargaining. In ruling that the NLRA preempted the statute, the court by necessary implication, must have found that NLRA preemption concerns all issues arising out of labor and management relations and not just those issues dealing with collective bargaining. The Second Circuit's decision to the contrary is in conflict.

B. The Second Circuit's decision conflicts with decisions of the United States Supreme Court regarding the breadth of the minimum standard exception to *Machinists* preemption.

In *Metropolitan Life*, the United States Supreme Court recognized that a state does not violate the *Machinists* doctrine where it establishes a minimum substantive labor standard consistent with the NLRA's

goal of establishing an equitable process for determining the terms and conditions of employment, provided the standard affects union and non-union employees the same and neither encourages nor discourages the collective-bargaining process that is the subject of the NLRA. *See Metropolitan Life*, 471 U.S. at 753-755 (court affirmed state statute requiring insurance companies to provide minimum mental health care benefits to every person insured for hospital and surgical expenses under any health insurance policy or employee health care plan); *see also Fort Halifax Packing Company, Inc. v. Coyne*, 482 U.S. 1, 19-22 (1987) ("*Fort Halifax*") (court upheld state statute requiring employers of 100 people or more to pay severance equal to one week's pay for each year of service in the event of a plant closing unless the employees are subject to an employment contract that addresses severance pay). In the present case, the Second Circuit held that the annualization regulation is a minimum standard because the annualization regulation was not designed to encourage or discourage employees in the promotion of their interests collectively. *See* Appendix at 13a.

The Second Circuit's holding does not comport with *Metropolitan Life*. First, as the Second Circuit recognized, the annualization regulation imposes an additional cost on non-union employers and employees through indirect taxes on cash payments which the regulation effectively forces non-union employers to make to avoid the exorbitant costs of annualization. *See* Appendix at 11a.

Second, the annualization regulation discourages negotiations between Petitioner and its employees. As a result of the annualization regulation, the Petitioner and its employees cannot choose to deposit prevailing

supplements paid on public construction projects into an employee benefit plan without suffering the effects of annualization. If the Petitioner were to choose to pay the prevailing supplements into an employee benefit plan, the Petitioner would be forced to pay union negotiated supplements for privately owned construction work instead of the supplements that the Petitioner, a non-union contractor, and its employees negotiated. In contrast, union contractors performing public construction work can deposit prevailing supplements into an employee benefit plan pursuant to a voluntarily negotiated collective bargaining agreement, and not suffer the effects of annualization. Although the annualization regulation is supposed to further the State's primary interest in equalizing competitive bidding on public projects by requiring union and non-union contractors to pay the same prevailing benefits, *see Action Electrical Contractors*, 64 N.Y.2d at 222 (1984); *see also Burgio*, 107 F.3d at 1003, the real impact of annualization is to improperly regulate the playing field between union and non-union contractors on private projects. Thus, the annualization regulation is not a minimum standard permitted by *Metropolitan Life*.

C. The Second Circuit's decision conflicts with a decision of the United States Court of Appeals for the Ninth Circuit.

In *Chamber of Commerce of the United States v. Bragdon*, 64 F.3d 497 (9th Cir. 1995) ("*Bragdon*"), the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") recognized that substantive labor requirements can be so restrictive or intrusive that they effectively thrust the State into the private bargaining process and dictate the results of a contract thereby

violating the *Machinists* doctrine. *See Bragdon*, 64 F.3d at 501; *see also Associated Builders & Contractors of Rhode Island, Inc. v. City of Providence*, 108 F.Supp.2d 73, 81 (D.R.I. 2000).

In *Bragdon*, the Ninth Circuit invalidated a county ordinance that required contractors to pay prevailing wages and benefits to their employees on certain private industrial construction projects costing over $500,000 as a quid pro quo for obtaining a building permit. *See Bragdon*, 64 F.3d at 498-499. Unlike the isolated statutory provisions of general application approved in *Metropolitan Life*, and *Fort Halifax*, and minimum wage laws that apply to all employees across the board, the Ninth Circuit found that the ordinance was overly intrusive and impermissibly dictated the terms of private contracts because it (a) dictated the wages and benefits that a contractor had to pay to each craft; (b) benefited only those workers engaged in the specific projects covered by the ordinance; and (c) tied the wages and benefits to the collective bargaining agreements negotiated by other employers and employees rather than the bargains struck by the contractors and employees who were actually performing the private work. *See Id.* at 502-503; *see also Metropolitan Life*, 471 U.S. at 727; *Fort Halifax*, 482 U.S. at 4. The Ninth Circuit concluded that "this type of minimum labor standard enactment, which is not of general application, but targets particular workers in a particular industry and is developed and revised from the bargaining of others, affects the bargaining process in a way that is incompatible with the goals of the NLRA." *Bragdon*, 64 F.3d at 504.

The Ninth Circuit's determination was supported by a recent opinion of the United States District Court

for the District of Rhode Island (the "Rhode Island District Court") in *Associated Builders & Contractors of Rhode Island, Inc. v. City of Providence*, 108 F.Supp.2d 73, 81 (D.R.I. 2000). In *Associated Builders and Contractors of Rhode Island*, the Rhode Island District Court struck down a city ordinance that required developers to execute project labor agreements on private projects in exchange for certain tax abatements because the ordinance impermissibly intruded into the private bargaining process in violation of the *Machinists* doctrine. *See Id.* at 81. In its opinion, the Rhode Island District Court stated: "[b]y influencing the decisions of private employers and employees regarding whether or not, and with whom to bargain, the city clearly implicates conduct Congress meant to leave unregulated." *Id.*

In addressing the annualization regulation, the Second Circuit reached the opposite conclusion from the Ninth Circuit and the Rhode Island District Court. In so concluding, the Second Circuit attempted to distinguish *Bragdon* claming that, unlike the California ordinance implicated in *Bragdon*, "New York's annualization regulation does not require prevailing wages or benefits for any employee who works on a private contract. The only time the prevailing wage standard is imposed is when an employee works on a public project." *See* Appendix at 12a – 13a. The Second Circuit's distinction is irrelevant when one compares the annualization regulation to the ordinance at issue in *Bragdon*.

First, like the *Bragdon* ordinance, the annualization regulation effectively dictates the benefits that a non-union contractor must pay to each craft on private projects. Second, as with the *Bragdon*

ordinance, the annualization regulation is not an isolated statutory provision of general application, but rather, it affects only those workers employed by non-union contractors who perform both public and private work, and more specifically, who exercise their legal right to pay the prevailing supplements for the public work into an employee benefit plan. Third, like the *Bragdon* ordinance, the annualization regulation requires non-union contractors to pay supplements on private projects based upon the collective bargaining agreements negotiated by other employers and employees, rather than the bargain struck by the non-union contractors and the employees who are actually performing the private work. Finally, as with the *Bragdon* ordinance, the annualization regulation is overly intrusive and impermissibly affects the bargaining process in a way that is incompatible with the NLRA.

Clearly, the Second Circuit's decision is at odds with the position taken in the Ninth Circuit and the Rhode Island District Court. As such, the issue is ripe for review by the United States Supreme Court and the petition for writ of certiorari should be granted.

II. THE SECOND CIRCUIT'S DECISION IS A MATTER OF PUBLIC IMPORTANCE BECAUSE IT LEAVES OPEN THE POSSIBILITY OF TOTAL STATE REGULATION OF PRIVATELY OWNED CONSTRUCTION PROJECTS.

At oral argument before the Second Circuit, the Respondent stated that while it has not chosen to do so yet, it could annualize wages on private construction projects in the same manner it annualizes wage

supplements under the annualization regulation. If the Respondent were permitted to annualize wages for non-union contractors that perform public work, then such action would go beyond the minimum standards held permissible in *Metropolitan Life* and *Fort Halifax*. Annualization of wages would be a substantive requirement so restrictive that it would effectively dictate the results of employment contracts between non-union labor and management that perform both public and private work. *See Bragdon*, 64 F.3d at 501. If the Second Circuit's decision is allowed to stand, then there is absolutely nothing in the NLRA that prohibits a state from requiring a contractor to pay its employees for work performed on private projects the wages and benefits, as dictated by union contractors, that a contractor must pay its employees for public work.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: October 10, 2003

Respectfully submitted,

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(Any footnotes trail the end of each document)

Docket No. 02-7947

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RONDOUT ELECTRIC, INC.,
Plaintiff-Appellee,

-v.-

NYS DEPT. OF LABOR, LINDA ANGELLO, CHRISTOPHER ALUND, Dir., Bureau of Public Work, New York State Department of Labor and ELIOT L. SPITZER, Attorney General of the State of New York,
Defendants-Appellants.

March 5, 2003, Argued
July 15, 2003, Decided

COUNSEL: J. SCOTT GREER, Lewis & Greer, P.C. (Veronica A. McMillan, on the brief), Poughkeepsie, NY, for Plaintiff-Appellee.

SETH KUPFERBERG, Assistant Attorney General, State of New York (Eliot Spitzer, Attorney General; Marion Buchbinder, Assistant Solicitor General; M. Patricia Smith, Assistant Attorney General, on the brief), New York, New York, NY for Defendants-Appellants.

JUDGES: Before: JACOBS, POOLER, Circuit Judges, and HALL, District Judge.*

OPINION BY: Janet C. Hall

OPINION: JANET C. HALL, District Judge:

Defendants, New York Department of Labor ("DOL"); its Commissioner, Linda Angello; the Director of its Bureau of Public Work, Christopher Alund; and the New York State Attorney General, Eliot Spitzer, appeal from the judgment of the United States District Court for the Southern District of New York (Brieant, J.) granting summary judgment to plaintiff, Rondout Electric Inc. ("Rondout"). The district court held that a DOL annualization regulation, N.Y. Comp. Codes R. & Regs. tit. 12, § 220.2(d)(1) (2002), enacted to implement New York's prevailing wage statute, N.Y. Lab. Law § 220 (2003), was preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151-169, and thus violates the Supremacy Clause, U.S. Const. art. VI, cl. 2. Rondout contends, and the district court held, that the annualization regulation violates the Machinists doctrine. See Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 49 L. Ed. 2d 396, 96 S. Ct. 2548 (1976) [hereinafter Machinists]. Because we find that the State's implementation of the prevailing wage statute through use of an annualization formula is not within the scope of Machinists preemption, we reverse the decision of the district court.

BACKGROUND

Rondout is a New York corporation with its principal place of business in Poughkeepsie, New York. Rondout performs electrical contract work for projects in both the public and private sector. It employs approximately 75 non-union electricians. Approximately 50 percent of Rondout's electrical work is on public work projects, and 50 percent is on private projects.

The annualization regulation implements section 220 of the New York Labor Law which was "designed to insure

that employees on public works projects were paid wages equivalent to the prevailing rate of similarly employed workers in the locality." Burgio & Campofelice, Inc. v. NYS Dep't of Labor, 107 F.3d 1000, 1003 (2d Cir. 1997). The prevailing wage rate is determined annually by the fiscal officer, as defined within the statute, pursuant to section 220(5). N.Y. Lab. Law § 220(5) (2003). Section 220 was designed to implement Article I, section 17 of the New York Constitution, which provides that "no laborer, worker or mechanic in the employ of a contractor or sub-contractor engaged in the performance of any public work . . . shall . . . be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used." N.Y. Const. art. 1, § 17.

As originally enacted, section 220 was silent on the issue of fringe benefits, allowing employers who provided no such benefits to underbid those that did. Burgio, 107 F.3d at 1003. In 1956, the statute was amended to require that all bidders for public work contracts assume the cost of prevailing wage supplements in the locality. Id. (citing N.Y. Lab Law § 220(3)). The prevailing wage rate is now calculated to include not only the hourly cash wages paid to workers, but also to include supplements. HMI Mech. Sys. Inc. v. McGowan, 266 F.3d 142, 145 (2d Cir. 2001). "Supplements" are defined as "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay[,] life insurance, and apprenticeship training." N.Y. Lab. Law § 220(5)(b) (2003). This amendment "presumably put[] all bidders

on an even footing." Gen. Elec. Co. v. N.Y. State Dep't of Labor, 891 F.2d 25, 28 (2d Cir. 1989).

The hourly value of supplements is calculated by DOL according to the annualization regulation, which provides:To determine the hourly cash equivalent of any applicable supplement provided to or on behalf of laborers, workers and mechanics employed upon public work projects in accordance with subdivision (a) of this section, the Commissioner of Labor will: (1) divide the actual contribution or cost for providing such supplement by the total annual hours worked on both public and private work, where such proof is provided to the Commission of Labor by the employer . . . .N.Y. Comp. Codes R. & Regs. tit. 12, § 220.2(d)(1) (2002). Contractors may pay supplements (1) to a fund that pays benefits to the employee, including a qualifying ERISA plan; (2) as a cash payment to the employees in lieu of payment to a benefit plan; or (3) in any combination thereof as long as the total payment is not less than the total prevailing wage supplements. N.Y. Comp. Codes R. & Regs. tit. 12, § 220.2(a) (2002).

If it determines that wages or supplements are due, DOL requires that the public entity owing payment to the contractor withhold such payment in an amount sufficient to satisfy the wages and supplements, including interest and any civil penalty that may be assessed pending a final determination. N.Y. Lab. Law § 220b(2)(a) (2003). After ordering the withholding, DOL commences an investigation and schedules an administrative hearing on the matter. Id. at § 220-b(2)(c).

Since January 1, 1996, Rondout has maintained an ERISA Prevailing Wage Pension and Annuity Plan ("Plan") for the benefit of its laborers, workers, and

machinists employed on public work projects. For each hour during the plan year that an eligible Rondout employee works on a public work project, Rondout contributes to that Plan an amount equal to the hourly prevailing wage supplement specified by the Commissioner. However, the annualization regulation requires Rondout to pay the supplement in respect of hours worked by its employees on private projects as well as public work projects; this is the purpose of the regulation and the ground on which Rondout argues preemption. Because Rondout pays no supplement for hours worked on private projects, workers receive less than they would under the annualization regulation.

Rondout's contribution for the benefit of an individual employee is solely for the benefit of that employee. Each eligible employee has a self-directed, individual account within the Plan, which vests immediately. None of the contributions that Rondout makes to an employee's account within the Plan are used to obtain benefits for individuals other than the eligible employee on whose behalf the payments were made.

On December 19, 2000, DOL issued four separate "Notice of Labor Law Inspection Findings" to Rondout, alleging that Rondout had underpaid prevailing wages and supplements to its employees on public work projects. DOL also issued notices to each public agency with which Rondout had a contract to withhold money from its payment pending the outcome of an administrative hearing on the underpayment claims. After DOL scheduled an administrative hearing with respect to its investigations, Rondout filed this action, alleging that the benefits annualization regulation violates federal law. Rondout argues that the formula set forth in the annualization regulation is preempted by the NLRA, 29 U.S.C. § 151 et seq., under the doctrine of

Machinists preemption, because, as applied, it impermissibly interferes with the equality of bargaining power between labor and management on both private and public work projects. Rondout argues further that it affects adversely the competitive position of non-union contractors within the private marketplace. The district court granted Rondout's motion for summary judgment, and this appeal followed.

DISCUSSION

A grant of summary judgment is reviewed de novo. Mandell v. County of Suffolk, 316 F.3d 368, 376 (2d Cir. 2003). "Summary judgment is appropriate only if it can be established 'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Sheppard v. Beerman, 317 F.3d 351, 354-55 (2d Cir. 2003)(internal citations omitted). The material facts in this action are not in dispute.

The issue on appeal is whether the annualization regulation is preempted by the NLRA. Pursuant to this regulation, DOL determines the hourly cash equivalent of any applicable supplement paid to workers covered by the law by dividing the annual contribution, or the cost of providing such a supplement, by the total number of hours worked by employees on both public and private work. N.Y. Comp. Codes R. & Regs. tit. 12, § 220.2(d)(1) (2002); HMI, 266 F.3d at 145. In other words, DOL determines a contractor's compliance with the annualization regulation by calculating the hourly cash equivalent of public work supplements that contractors pay by dividing the actual cash value of a contractor's supplement contribution, by the total number of hours employees work annually on both public and private jobs. Id. The annualization regulation is designed to

discourage contractors from paying supplements, owed to employees for public work, into an employee benefit plan that also provides benefits to employees for private work, a practice commonly known as "pooling." This practice dilutes the value of the supplements paid into the plan on behalf of the employee for work done on public works. Id. at 146.

In HMI, it was argued that "this formula always results in a shortfall in its contributions if an employee performed any private work during the period analyzed." Id. at 151. This court found in HMI that this result "is precisely the desired effect of Section 220, which creates an economic disincentive for employers to use pooled supplement plans." Id.

While the plaintiffs in HMI argued that the annualization regulation was preempted by ERISA, an argument we rejected, id., Rondout argues here that the annualization regulation is preempted under the NLRA and Machinists doctrine.

A. NLRA Preemption

The Supremacy Clause of the United States Constitution provides that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. State law is preempted explicitly where Congress states an intent to occupy a field and to exclude state regulation. State law is preempted implicitly where the federal interest in the subject matter regulated is so pervasive that no room remains for state action, indicating an implicit intent to occupy the field, or where the state regulation at issue conflicts with federal law or stands as an obstacle to the accomplishment of its objectives. Pac. Gas & Elec. Co. v.

State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983); Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982); Sprint Spectrum L.P. v. Mills, 283 F.3d 404, 414-15 (2d Cir. 2002) (citing cases). Federal law may preempt state regulation in whole or in part. Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469, 81 L. Ed. 2d 399, 104 S. Ct. 2518 (1984); Sprint Spectrum, 283 F.3d at 415. Although not a source of a federal right by itself, the Supremacy Clause "'secures federal rights by according them priority whenever they come in conflict with state law.'" Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 107, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989) (alteration in original) (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 613, 60 L. Ed. 2d 508, 99 S. Ct. 1905 (1979) (internal quotation marks omitted)).

The Supreme Court has recognized that, in enacting the NLRA, Congress manifested an unambiguous intent to supplant some aspects of state law that affect labor relations. Bethlehem Steel Co. v. N.Y. State Labor Relations Bd., 330 U.S. 767, 771-76, 91 L. Ed. 1234, 67 S. Ct. 1026 (1947). "The doctrine of labor law pre-emption concerns the extent to which Congress has placed implicit limits on 'the permissible scope of state regulation of activity touching upon labor-management relations.'" N.Y. Tel. Co. v. N.Y. State Dep't of Labor, 440 U.S. 519, 527, 59 L. Ed. 2d 553, 99 S. Ct. 1328 (1979) (plurality opinion) (quoting Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 187, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978)). However, because the NLRA "leaves much to the states [and] Congress has refrained from [indicating] how much, [courts] must spell out from conflicting indications of congressional will the area in which state action is still

permissible." Garner v. Teamsters, Chauffeurs & Helpers Local Union, No. 776, 346 U.S. 485, 488, 98 L. Ed. 228, 74 S. Ct. 161 (1953). "Cases that have held state authority to be pre-empted by federal law tend to fall into one of two categories: (1) those that reflect the concern that 'one forum would enjoin, as illegal, conduct which the other forum would find legal' and (2) those that reflect the concern 'that the [application of state law by] state courts would restrict the exercise of rights guaranteed by the Federal Acts.'" Machinists, 427 U.S. at 138 (alteration in original) (quoting UAW v. Russell, 356 U.S. 634, 644, 2 L. Ed. 2d 1030, 78 S. Ct. 932 (1958)).

At issue in this appeal is the second category of preemption, n1 known as Machinists preemption, which focuses on "whether Congress intended that the conduct involved be unregulated because [such conduct was] left 'to be controlled by the free play of economic forces.'" Id. at 140 (quoting NLRB v. Nash-Finch Co., 404 U.S. 138, 144, 30 L. Ed. 2d 328, 92 S. Ct. 373 (1971)). States may not "deny[ ] one party to an economic contest a weapon that Congress meant him to have available." Id. at 150 (internal quotation omitted). Under Machinists, "States are. . . . prohibited from imposing additional restrictions on economic weapons of self-help, such as strikes and lockouts, unless such restrictions presumably were contemplated by Congress." Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 614-15, 89 L. Ed. 2d 616, 106 S. Ct. 1395 (1986) (citation omitted). Thus, state action is only preempted if it regulates the use of economic weapons that are recognized and protected under the NLRA such that the state or local government has entered "'into the substantive aspects of the bargaining process to an extent Congress has not countena. ed.'" Machinists, 427 U.S. at 149 (quoting N.L.R.B. v. Ins. Agents Int'l Union, AFL-CIO, 361 U.S. 477, 498, 4 L. Ed. 2d 454, 80 S. Ct. 419(1960)); see also

N.Y. Tel., 440 U.S. at 533 (plurality opinion). There are two general exceptions to the Machinists doctrine: first, if the state regulation works to establish minimum substantive labor standards that are consistent with the legislative goals of the NLRA, Metropolitan Life Insurance Co. v. Mass., 471 U.S. 724, 757, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985), and second, if the state is a market participant or proprietor, Bldg. & Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 227, 122 L. Ed. 2d 565, 113 S. Ct. 1190 (1993).

1. Minimum Substantive Labor Standards and the Legislative Goals of the NLRA

As the Supreme Court made clear in Metropolitan Life, "the framework established in the NLRA was merely a means to allow the parties to reach . . . agreement fairly." 471 U.S. at 754. "The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." Id. at 753. In Metropolitan Life, the Supreme Court held that "minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." Id. at 755. The Court found that such minimum labor standards have only "the most indirect effect on the right of self-organization established in the Act." Id. "Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part 'designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive' the mandated

[benefit]." Id. (emphasis original, internal citations omitted). The Court found that these laws do not even "inadvertently affect the interests implicated in the NLRA." Id.

Rondout argues that the annualization regulation in effect injects the State improperly into the bargaining process by dictating the employee supplements that Rondout must pay on private construction projects. Rondout argues that the mere fact that the employer may opt to pay the prevailing supplement in cash instead of into a benefit plan does not alleviate the conflict between the annualization regulation and the Machinists doctrine. A non-union contractor can avoid annualization supplements by paying the public work employee in cash, but to do so, Rondout argues, requires the employer to incur additional social security taxes and higher insurance premiums on the added payroll. n2 Additionally, Rondout argues that the employee must pay payroll taxes on the cash payments, which dilutes the real value of the supplements and deprives the employee of the long-term advantages of a tax-deferred benefit plan. n3 DOL responds that while the cash option may increase the cost of Rondout doing business, the additional costs are insufficient to invoke NLRA preemption. n4

While the annualization regulation may impose an additional cost on non-union employers through indirect taxes on the cash payment option, this increase does not affect the bargaining process that is the subject of the NLRA. As the Supreme Court has held, "the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of pre-emption, for 'there is nothing in the NLRA . . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be the subject of

collective bargaining.'" Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21, 96 L. Ed. 2d 1, 107 S. Ct. 2211 (1987) (alteration in original) (quoting Malone v. White Motor Corp., 435 U.S. 497, 504-05, 55 L. Ed. 2d 443, 98 S. Ct. 1185 (1978)). Machinists preemption prohibits state regulation of bargaining conduct that Congress intended to be left to the free play of economic forces. Machinists, 427 U.S. at 150-51. Unlike the NLRA, the annualization regulation is not "designed to encourage or discourage employees in the promotion of their interests collectively." Metro. Life, 471 U.S. at 755. Without some connection between the prevailing wage supplement and labor/management bargaining, the annualization regulation fails to come within the sphere of Machinists preemption under the NLRA.

In support of its argument that the annualization regulation affects the labor/management bargaining process that is protected under the NLRA, Rondout relies on a Ninth Circuit case, Chamber of Commerce v. Bragdon, 64 F.3d 497, 501 (9th Cir. 1995). Rondout relies on Bragdon for the proposition that substantive labor requirements can be so restrictive or intrusive that they effectively thrust the state into the private bargaining process and dictate the results of the contract. Bragdon can be easily distinguished from the present case, however. In Bragdon, the Ninth Circuit found a California ordinance that required employers to pay prevailing wages to their employees on certain types of private industrial construction projects costing over $ 500,000 to be preempted by the NLRA. "Here, we have a prevailing wage concept, which was developed for use by government entities when they are acting as proprietors and participants in the marketplace, being imposed to regulate the wages paid on private construction projects." Id. Unlike the California ordinance, New York's annualization regulation does not

require prevailing wages or benefits for any employee who works on a private contract. The only time the prevailing wage standard is imposed is when an employee works on a public project. Having distinguished Bragdon, we have no need to decide whether Bragdon was correctly decided on its own facts.

Even if Bragdon were controlling authority, Rondout fails to establish how the annualization regulation would affect the bargaining process itself. Although the tax implications may have an indirect economic impact on the bidding process, n5 it does not bind an employer or employee to a particular choice or eliminate particular bargaining tools. Thus, it is not preempted under the Machinists doctrine. In New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 659, 131 L. Ed. 2d 695, 115 S. Ct. 1671 (1995), the Supreme Court examined a similar, indirect economic impact in a case involving alleged preemption under ERISA. In that case, the Court stated that:an indirect economic influence, however, does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself . . . . It simply bears on the costs of benefits and the relative costs of competing insurance to provide them. It is an influence that can affect a plan's shopping decisions, but it does not affect the fact that any plan will shop for the best deal it can get, surcharges or no surcharges.Id. at 659-60. Likewise, in this case, the additional taxes on the cash payment option may factor into the business decision of the non-union employer when taking a public job. However, employees remain free to negotiate contracts under which they never work on public work projects, or only do so on the condition that they receive their supplement in benefits, thus avoiding the additional payroll tax. Employers remain free to require

employees to take the cash supplement, thereby avoiding the pooling disincentive. Nothing in the regulation imposes a specific choice on either the employer and employee. Thus, the annualization regulation does not fall within the scope of the NLRA and is not preempted by it. n6

CONCLUSION

For the foregoing reasons, the decision of the district court is reversed. The case is remanded for entry of summary judgment in favor of the appellants.

FOOTNOTES

* The Honorable Janet C. Hall of the United States Court for the District of Connecticut, sitting by designation.

n1 The first category of preemption developed from a line of cases that focused on the primary jurisdiction of the National Labor Relations Board ("NLRB"). San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244-47, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959). Garmon and its progeny hold that the NLRA preempts state regulation that either prohibits conduct subject to the regulatory jurisdiction of the NLRB under section 8 of the NLRA or facilitates conduct prohibited by section 7 of the NLRA. Id.; Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274, 290-91, 29 L. Ed. 2d 473, 91 S. Ct. 1909 (1971).

In this case, Rondout does not claim that the annualization regulation or the defendants' actions prohibit conduct subject to the regulatory jurisdiction of the NLRB under section 8 of the NLRA or facilitate conduct prohibited by section 7 of the NLRA. Thus, Garmon preemption does not apply here.

n2 "For every dollar in payroll, Rondout must pay an additional 7.65 % F.I.C.A., 7 % in workers' compensation insurance, and 2.7 % in general liability insurance. Thus, the actual cost to Roundout is approximately $ 1.17 for every cash dollar that Rondout pays its employees for prevailing wage supplements." Affidavit of Wilbur Whitman, President of Rondout, P 131.

n3 "In addition our employees are required to pay 7.65 % in F.I.C.A. for each dollar that the employees receive in cash, thereby reducing the cash value of the prevailing wage supplement to approximately $ 0.92 on the dollar." Affidavit of Wilbur Whitman, President of Rondout, see supra note 2.

n4 DOL also disputes the amount of these additional costs as calculated by Rondout, see n.2 and 3, supra, arguing that these costs are significantly lower than Rondout suggests.

n5 The State concedes that "a contractor using the cash option could litigate a claim that it should receive credit for such [additional] costs before the DOL or in state court." Appellants' Brief at 20.

n6 Because we have found that the annualization regulation works to establish minimum substantive labor standards that are consistent with the legitimate goals of the NLRA, the court need not address the "market participant" exception to preemption.

02 Civ. 0160 (CLB)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW

RONDOUT ELECTRIC, INC.,
Plaintiff,

- against -

NEW YORK STATE DEPARTMENT OF LABOR; LINDA ANGELLO, COMMISSIONER, DEPARTMENT OF LABOR; CHRISTOPHER ALUND, DIRECTOR, BUREAU OF PUBLIC WORK, NEW YORK STATE DEPARTMENT OF LABOR; ELIOT SPITZER, ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Defendants.

Memorandum & Order

Brieant. J.,

Plaintiff Rondout Electric, Inc. ("Rondout"), an electrical contractor, commenced this lawsuit to challenge the constitutionality of a rule of the Defendant New York State Department of Labor ("DOL") commonly known as the "annualization regulation," 12 N.Y.C.R.R. § 220.2(d)(1). Defendants move for an order pursuant to F.R.Civ.P. 12(b)(6) dismissing Count VI of the Amended Complaint, dated March 1, 2002, the only claim surviving the parties' Stipulation and Order dated April 5, 2002. Plaintiff moves for summary judgment on Count VI of its Amended Complaint. This Court exercises jurisdiction pursuant to 28 U.S.C. § 1331.

Background

Rondout, a New York corporation with its principal place of business at 33 Arlington Avenue, Poughkeepsie, New York, provides electrical contract work for projects in both the public and private sector. This lawsuit arises from complaints filed by Defendants, specifically the New York State Department of Labor ("DOL"), a governmental department of the State of New York, which exists pursuant to New York Labor Law § 10 et seq., and individual defendants, Linda Angello, Commissioner of the DOL, Christopher Alund, Director of the Bureau of Public Works, State of New York DOL, and Eliot Spitzer, Attorney General of New York, against Plaintiff for non-compliance with New York Labor Law § 220.

New York Constitution Art. I, § 7 provides, "no laborer, workman, or mechanic, in the employ of a contractor or sub-contractor engaged in the pefformance of any public work, shall . . . be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used." New York Labor Law § 220, which implements this Constitutional provision was designed originally to insure that employees on public works projects were paid cash wages equivalent to the prevailing rate of similarly employed workers in the locality. See Burgio and Campofelice, Inc. v. NYS Department ofLabor, 107 F.3d 1000, 1003 (2d Cir. 1997). The prevailing wage rate is determined annually by the fiscal officer, as defined within the statute, pursuant to § 220.5.

Because the statute in its original form made no reference to fiinge benefits, the statute was amended in 1956 to require that all bidders on public works

contracts assume the cost of prevailing wage supplements in the locality. This was done in part in an effort to avoid underbidding by contractors who did not provide such benefits. See N.Y. Labor Law § 220(3). "Supplements" are defined as "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay and life insurance." § 220.5(b). The amount of prevailing wage supplements is determined in the same manner as the prevailing wage rate. See § 220.5(c).

Contractors may pay supplements (i) to a fund that pays benefits to the employee, including a qualifying ERISA plan; (ii) as a cash payment to the employees in lieu of payment to a benefit plan; or (iii) in any combination thereof as long as the total payment is not less than the total prevailing wage supplements. The amount of supplements to be contributed is calculated by the DOL according to an "annualization regulation' 'pursuant to § 220.2(d)(1), which provides:

To determine the hourly cash equivalent of any applicable supplement provided to or on behalf of laborers, workers and mechanics employed upon public work projects in accordance with subdivision (a) of this section, the Commissioner of Labor will: (1) divide the actual contribution or cost for providing such supplement by the total annual hours worked on both public and private work, where such proof is provided to the Commissioner of Labor by the employer.

The statute provides an enforcement scheme for non-compliance. If unpaid wages or supplements "appear to be due" from a public-work contractor, the DOL requires

that the public entity owing payments to the contractor withhold such payments in an amount "sufficient . . . to satisfy said wages and supplements, including interest . . . and any civil penalty that may be assessed . . . pending a final determination." §220-b(2)(a). After ordering the withholding, the DOL causes an investigation and orders an administrative hearing to determine the issues raised, to be conducted expeditiously. See § 220-b(2)(c). Any person or corporation who willfully fails to pay prevailing wages or supplements as established by the Commissioner of Labor shall be guilty of a misdemeanor. See § 220.3.

Rondout has operated in public and private work as a non-union, open-shop electrical contractor since incorporation in 1962. Rondout employs approximately 75 non-union electricians. Approximately 50% of Rondout's electrical contracting work is on public works projects and the remaining 50% is performed on private projects. Since January 1, 1996, Rondout has maintained an ERISA Prevailing Wage Pension and Annuity Plan for the benefit of its laborers, workers and machinists employed on public works projects. For each hour during the plan year that an eligible Rondout employee works on a public works project, Rondout contributes to that Plan solely for the benefit of that employee an amount equal to the prevailing wage supplement specified by the Commissioner of Labor. Each eligible employee has a selfdirected individual account within the prevailing wage plan where Rondout deposits the prevailing wage supplements earned by the eligible employee on public works projects, which vest immediately. None of the contributions that Rondout makes to an employee's account within the prevailing wage plan are used to obtain benefits for individuals other than the eligible employee on whose behalf the payments were made.

contracts assume the cost of prevailing wage supplements in the locality. This was done in part in an effort to avoid underbidding by contractors who did not provide such benefits. See N.Y. Labor Law § 220(3). "Supplements" are defined as "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay and life insurance." § 220.5(b). The amount of prevailing wage supplements is determined in the same manner as the prevailing wage rate. See § 220.5(c).

Contractors may pay supplements (i) to a fund that pays benefits to the employee, including a qualifying ERISA plan; (ii) as a cash payment to the employees in lieu of payment to a benefit plan; or (iii) in any combination thereof as long as the total payment is not less than the total prevailing wage supplements. The amount of supplements to be contributed is calculated by the DOL according to an "annualization regulation' 'pursuant to § 220.2(d)(1), which provides:

To determine the hourly cash equivalent of any applicable supplement provided to or on behalf of laborers, workers and mechanics employed upon public work projects in accordance with subdivision (a) of this section, the Commissioner of Labor will: (1) divide the actual contribution or cost for providing such supplement by the total annual hours worked on both public and private work, where such proof is provided to the Commissioner of Labor by the employer.

The statute provides an enforcement scheme for non-compliance. If unpaid wages or supplements "appear to be due" from a public-work contractor, the DOL requires

Plaintiff filed an Amended Complaint on February 27, 2002 alleging that the "annualization regulation" used by the DOL to calculate Plaintiff's alleged underpayments of its prevailing wages and supplements violates federal law. Pursuant to the Stipulation & Order signed by this Court on April 5, 2002, only Count VI remains pending in the case. In Counts I through V Plaintiff alleged that the regulation violates the Due Process Clause and the Equal Protection Clause of the United States Constitution, but Plaintiff withdrew these claims without prejudice in light of a recent opinion of the Second Circuit Court of Appeals in Diamond "D" Construction Corp. v. New York State Department of Labor, 282 F.3d 191 (2d Cir. 2002) (holding that Younger abstention applied to constitutional claims that may be heard in a state court proceeding following DOL's administration hearing on the alleged underpayments of prevailing wages and supplements).

Analysis

In Count VI, at issue here, Plaintiff alleges and this Court agrees that the annualization formula set forth in 12 N.Y.C.R.R. § 220.2(d)(1), as applied, is preempted by the NLRA, 29 U.S.C.S. § 151 et seq., because, as applied, it impermissibly interferes with the equality of bargaining power between labor and management on both private and public works projects, and affects adversely the competitive position of non-union contractors within the private marketplace. Plaintiff Rondout seeks a judgment of this Court pursuant to 28 U.S.C. § 2201 declaring Labor Law § 220(3), 12 N.Y.C.R.R. § 220.2(a) and § 220.2(d)(1) unconstitutional under the Supremacy Clause of the United States Constitution and enjoining Defendants, pursuant to 28 U.S. C.S. § 2202, the NY DOL from enforcing the regulations against Rondout.

Plaintiff claims and this Court concludes that the DOL regulation effectively requires non-union contractors such as Rondout, who provide labor on public works projects in the State of New York, to pay prevailing wage supplements as determined by the DOL for its employees who work on private projects during the same year. According to § 220.2(d)(1), if an employer pays prevailing wage supplements into an employee benefit plan pursuant to 12 N.Y.C.R.R. § 220.2(a), the DOL will calculate the employee's hourly cash equivalent by dividing the actual contribution by the total annual hours worked on both public and private projects, rather than just hours worked on public works project. If, as in Rondout's case, the non-union employer does not pay prevailing wage supplements on private work, the DOL's calculation will always result in an underpayment of prevailing wage supplements on public work projects. As the regulation is applied, the only way a non-union employer who contributes prevailing wage supplements to an employee benefit plan with respect to public works projects may comply with 12 N.Y.C.R.R. § 220(d)(1), is to also provide all its employees with prevailing wage supplements for every hour worked during the year on private projects.

Plaintiff s motion for summary judgment pursuant to F.R.Civ.P. 56 "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986). In deciding Plaintiff's motion for summary judgment, the Court must view the record as a whole and in a light most favorable to Defendants. See Anderson v. Liberty Lobby, 477 U.S. 242, 255, 106 S.Ct.

2505, 2513 (1986); see also Allen v. Coughlin, 64 F.3d 77, 80 (2d Cir. 1995).

The Court denies Defendants' motion to dismiss Count VI of the Amended Complaint. The allegations raised in the Amended Complaint state a question of the constitutionality of the New York Department of Labor annualization regulation, 12 N.Y.C.R.R. § 220.2(d)(1). With respect to Plaintiff s motion for summary judgment, the Court concludes that there is no genuine issue of disputed fact between the parties as to the operation of the regulation, rather the question before the Court for decision is one of pure law. For the reasons set forth below, the Court concludes that the NLRA preempts the NYDOL regulation, codified at 12 N.Y.C.R.R. § 220.2(d)(1), and accordingly grants summary judgment in favor of Plaintiff.

A federal law derives its preemptive power from the Supremacy Clause, which provides, "[t]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, Article VI, section 2, clause 2. Although the NLRA contains no explicit preemption language, its preemptive affect may be applied according to Supreme Court doctrine. See Metropolitan Life, 471 U.S. at 747. The first, the Garmon preemption doctrine, see San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), which protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA, is not at issue here. The second principle, known as the Machinists doctrine, prohibits state regulation of conduct that Congress intended to leave "controlled by the free play of economic forces." See Lodge 76,

International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission, 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976) (holding that a Wisconsin law prohibiting an employee's refusal to work overtime during collective bargaining negotiations as preempted by NLRA because the conduct constituted activity that must be free of state regulation if Congressional intent in enacting comprehensive federal law of labor relations was not to be frustrated). The NLRA preempts state law that regulates conduct that Congress intended to be left to free play of economic forces. See id. However, the Court is mindful that "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." Builders, 507 U.S. 218, 224, 113 S.Ct. 1190, 1194 (1993) quoting Maryland v. Louisiana, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129 (1981).

In 1985, the Supreme Court in Metropolitan Life Insurance Company v. Massachusetts Travelers Insurance Company, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed2d 728 (1985), rejected preemption challenges under the Machinists doctrine that minimum standards imposed upon employers impermissibly interfered with free play of collective bargaining because such laws in effect mandate terms of collective bargaining agreements. See id. (holding that a Massachusetts statute that required mental health benefits be included in general insurance policies, even those adopted through collective bargaining was not invalid).

Thus, the NLRA does not operate to remove all burdens from parties who arrive at the collective bargaining table. "The establishment of labor standards falls within the traditional police power of the state." Fort Halifax Packing Company, Inc. v. Coyne, 482 U.S. 1, 21 (1987). States may impose requirements on the parties to

collective bargaining to include certain terms in health insurance policies, see Metropolitan Life, 471 U.S. 724; and the state may require that an employer pay a lump sum severance to employees when closing a factory of more than 100 employees, see Fort Halifax, 482 U.S. 1. In other words, "when a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act." Metropolitan Life, 471 U.S. at 757.

Against this backdrop, our Court of Appeals evaluated whether New York's prevailing wage statute, § 220, was preempted by ERISA and the NLRA. See General Electric Company v. New York State Department of Labor, 891 F.2d 25 (1989). The Court of Appeals concluded that § 220 was preempted by ERISA, but not the NLRA, where a private contractor paid its union employees wages and supplements pursuant to a negotiated collective bargaining agreement for public project work on the Long Island Railroad. The DOL contended that GE paid wages and benefits less than those due under § 200. In rejecting NLRA preemption, the Court of Appeals relied upon Fort Halifax, stating "the NLRA is concerned with ensuring an equitable bargaining process not with the substantive terms that may emerge from such bargaining." Fort Halifax, 482 U.S. at 20; see also Metropolitan Life, 471 U.S. at 755.

The DOL regulation withstood its next two ERISA preemption challenges in Burgio and Campofelice, Inc. v. NYS Deparment of Labor, 107 F.3d 1000 (2d Cir. 1997), and HMI Mechanical Systems, Inc. v. McGowen, 266 F.3d 142 (2d Cir. 2001), in which the Court of Appeals for the Second Circuit concluded that the § 220 prevailing wage and supplements requirements were not preempted by ERISA as long as the DOL adhered to

Burgio's "total package" approach. In so holding, the Court of Appeals for the Second Circuit suggested, and Defendants here contend, that Plaintiff's characterization of the annualization regulation "is precisely the desired effect of Section 220, which creates an economic disincentive for employers to use pooled supplement plans." HMI, 266 F.3d at 151. "Pooling", not involved in this case, allows an employer to in effect, dilute the supplement benefits due each public work employee by spreading the benefits out to cover both public and private work. "The current enforcement method of NYSDOL thus directly affects employers by eliminating incentives for them to pool supplement contributions among public and private workers." HMI, 266 F.3d at 151. In neither of these ERISA cases was the issue of NLRA preemption raised or considered.

The Supreme Court addressed an outstanding issue with respect to NLRA preemption when it considered the market participant theory of state action. See Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 113 S.Ct. 1190, 122 L.Ed.2d 565 (1993) ("Boston Harbor"). When a state acts as a market participant, not as a regulator, the Machinists preemption does not apply. See id.

The Court of Appeals for the 9th Circuit applied this exception to Machinists preemption in Chamber of Commerce of the United States v. Bragdon, 64 F.3d 497 (9th Cir. 1995). The Bragdon court considered whether an Ordinance mandating that employers pay prevailing wages to their employees on wholly private construction projects was preempted by the NLRA. The Court concluded that because the Ordinance "affects the bargaining process in a much more invasive and detailed

fashion than the isolated statutory provisions of general application approved in Metropolitan Life and Fort Halifax, the Ordinance was subject to NLRA preemption under the Machinists preemption doctrine. In so holding, the Court noted that the state acted solely as a regulator because the conduct at issue involved payment of prevailing wages on totally private projects. Under Boston Harbor, when the state assumes the role of regulator, its role is different than when it is a market participant, and the Machinists preemption applies.

In the context of the construction industry, this means that where the state contracts to have work done, as in Builders, the NLRA has no preemptive effect because the state is acting as a market participant. However, when the conduct involves purely private parties, to which the state is not a party, the state acts as a regulator and may only regulate to the extent that it does not interfere with the free play of economic forces.

In the present case, the New York DOL acts as a market participant when Rondout engages in public works projects. As stated in Bragdon, the state is therefore exempt from NLRA preemption by virtue of its participation in purchasing the services of Rondout. However, in applying the regulation formula in its present form, the NYDOL accounts for, and therefore regulates, Rondout's work on private projects.

By application of the annualization regulation, the State of New York assumes the role of regulator. The annualization regulation effectively dictates what benefits Rondout may provide its employees on private works projects because if the employer does not contribute the prevailing wage to the benefit plan mandated by § 220, it will be in non-compliance with the New York law. Thus, at the bargaining table when

deciding what benefits Rondout will pay its employees, the parties are limited or otherwise affected by the requirements of the prevailing wage benefits in the public sector when determining the wages and benefits in the private sector. Like Bragdon, where the California Ordinance allocated the distribution of contributions between wages and benefits, the New York regulation allocates the distribution of contributions between wages and benefits for public projects and the wages and benefits for private projects. Such regulation is overly intrusive in the bargaining capabilities of the private parties, and the state regulation is preempted by the NLRA.

Conclusion

The Court grants Plaintiff's motion for summary judgment. Defendants' motion is denied. Submit a declaratory and injunctive final Judgment on five (5) days notice, which shall contain a stay pending appellate finality.

SO ORDERED.

Dated: White Plains, New York
July 8, 2002

Charles L. Brieant,
U.S.D.J.

McKINNEY'S CONSOLODATED LAWS OF
NEW YORK ANNOTATED
LABOR LAW
CHAPTER 31 OF THE CONSOLIDATED LAWS
ARTICLE 8 – PUBLIC WORK

§ 220. Hours, wages and supplements.

1. Eight hours shall constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law.

2. Each contract to which the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law is a party and which may involve the employment of laborers, workmen or mechanics shall contain a stipulation that no laborer, workman or mechanic in the employ of the contractor, subcontractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract shall be permitted or required to work more than eight hours in any one calendar day or more than five days in any one week except in cases of extraordinary emergency including fire, flood or danger to life or property. No such person shall be so employed more than eight hours in any day or more than five days in any one week except in such emergency. Extraordinary emergency within the meaning of this section shall be deemed to include situations in which sufficient laborers, workmen and mechanics cannot be employed to carry on public work expeditiously as a result of such restrictions upon the number of hours and days of labor and the immediate commencement or prosecution or completion without undue delay of the public work is necessary in the judgment of the industrial commissioner for the preservation of the

contract site and for the protection of the life and limb of the persons using the same. Upon the application of any person interested, the industrial commissioner shall make a determination as to whether or not on any public project or on all public projects in any area of this state, sufficient laborers, workmen and mechanics of any or all classifications can be employed to carry on work expeditiously if their labor is restricted to eight hours per day and five days per week, and in the event that the industrial commissioner determines that there are not sufficient workmen, laborers and mechanics of any or all classifications which may be employed to carry on such work expeditiously if their labor is restricted to eight hours per day and five days per week, and the immediate commencement or prosecution or completion without undue delay of the public work is necessary in the judgment of the industrial commissioner for the preservation of the contract site and for the protection of the life and limb of the persons using the same, the industrial commissioner shall grant a dispensation permitting all laborers, workmen and mechanics, or any classification of such laborers, workmen and mechanics, to work such additional hours or days per week on such public project or in such areas the industrial commissioner shall determine. Whenever such a dispensation is granted, all work in excess of eight hours per day and five days per week shall be considered overtime work, and the laborers, workmen and mechanics performing such work shall be paid a premium wage commensurate with the premium wages prevailing in the area in which the work is performed. No such dispensation shall be effective with respect to any public work unless and until the department of jurisdiction, as defined in this section, certifies to the industrial commissioner that such public work is of an important nature and that a delay in carrying it to completion would result in serious disadvantage to the

public. Time lost in any week because of inclement weather by employees engaged in the construction, reconstruction and maintenance of highways outside of the limits of cities and villages may be made up during that week and/or the succeeding three weeks.

2-a. Any person or corporation contracting with the state or a public benefit corporation, or a municipal corporation, or a commission appointed pursuant to law that shall require more than eight hours work for a day's labor, unless otherwise permitted by law, is guilty of a misdemeanor, and upon conviction therefore shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars for each offense.

3. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less than the prevailing rate of wages as hereinafter defined. No employee shall be deemed to be an apprentice unless he is individually registered in an apprenticeship program which is duly registered with the commissioner of labor in conformity with the provisions of article twenty-three of this chapter. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor,

subcontractor or other person about or upon such public work, shall be paid the wages herein provided.

The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon such public works, shall be in accordance with the prevailing practices in the locality, as hereinafter defined. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be provided supplements in accordance with the prevailing practices as hereinafter defined. No employee shall be deemed to be an apprentice unless he is individually registered in an apprenticeship program which is duly registered with the industrial commissioner in conformity with the provisions of article twenty-three of this chapter. The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be in accordance with the prevailing practices in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be provided the supplements as required in this article.

It shall be the duty of the fiscal officer, as defined in this section, to ascertain and determine the schedules of supplements to be provided and wages to be paid workmen, laborers and mechanics on such public work, prior to the time of the advertisement for bids, and such schedules shall be annexed to and form a part of the specifications for the work. Such fiscal officer shall file with the department having jurisdiction such schedules to the time of the commencement of the advertisement

for bids on all public works proposed to be constructed. The term "contract" as used in this subdivision also shall include reconstruction and repair of any such public work.

Any person or corporation that willfully pays or provides after entering into such contract, less than such stipulated wage scale or supplements as established by the fiscal officer shall be guilty of a misdemeanor and upon conviction shall be punished for such first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or both fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited; and no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state, municipal corporation or commission or board appointed pursuant to law pay the same or authorize its payment from the funds under his charge or control to any person or corporation for work done upon any contract, on which the contractor has been convicted for second offense in violation of the provisions of this section.

The commissioner shall ensure that all supplements due under this article shall be paid to or on behalf of an employee. The commissioner shall require proof that the pension plan for which any supplement has been paid is qualified as a bona fide plan by the United States internal revenue service. Acceptable proof shall be shown by submission of a determination letter issued by the United States internal revenue service.

3-a. a. It shall be the duty of the department of jurisdiction as defined in this section to ascertain from the plans and specifications the classification of

workmen, mechanics and laborers to be employed on such project. Such department shall file with the fiscal officer, as defined in this section, the classification of workmen, mechanics and laborers to be employed upon such public works project, together with a statement of the work to be performed by each such classification. From such statement it shall be the duty of the fiscal officer to make a proper classification of such workmen, mechanics and laborers taking into account whether the work is heavy and highway, building, sewer and water, tunnel work or residential and to make a determination of the schedules of wages and supplements to be paid or provided, as the case may be, therefore. The contractor and every sub-contractor on public works contracts shall post in a prominent and accessible place on the site where the work is performed a legible statement of all wage rates and supplements as specified in the contract to be paid or provided, as the case may be, for the various classes of mechanics, workingmen, or laborers employed on the work. Such posted statement shall be written in plain English and titled, in lettering no smaller than two inches in height and two inches in width, with the phrase "Prevailing Rate of Wages". Such posted statement shall be constructed of materials capable of withstanding adverse weather conditions. The contractor and every sub-contractor shall keep original payrolls or transcripts thereof, subscribed and affirmed by him as true under the penalties of perjury, showing the hours and days worked by each workman, laborer or mechanic, the occupation at which he worked, the hourly wage rate paid and the supplements paid or provided, on the site of the work where the contractor or sub-contractor maintains no regular place of business in New York state and where the amount of the contract is in excess of twenty-five thousand dollars. All other contractors or sub-contractors shall produce within five days on the site of the work and upon formal

order of the commissioner or his designated representative such original payrolls or transcripts thereof, subscribed and affirmed by him as true under the penalties of perjury, as may be deemed necessary to adequately enforce the provisions of this article. Every contractor, and sub-contractor, shall submit to the department of jurisdiction within thirty days after issuance of its first payroll, and every thirty days thereafter, a transcript of the original payroll record, as provided by this article, subscribed and affirmed as true under the penalties of perjury. The department of jurisdiction shall be required to receive and maintain such payroll records. The original payrolls or transcripts shall be preserved for three years from the date of completion of the work on the awarded contract. The department of jurisdiction as herein referred to shall be the department of the state, board or officer in the state, or municipal corporation or commission or board appointed pursuant to law, whose duty it is to prepare or direct the preparation of the plans and specifications for a public work project.

b. All departments of jurisdiction in respect of public work as to which the industrial commissioner is fiscal officer, as defined in this section, shall furnish to the industrial commissioner the following information immediately upon signing of a contract for such public work: (a) the name and address of the contractor engaged by said department of jurisdiction; (b) the date when the contract was let; (c) the approximate consideration stipulated for in said contract.

c. The fiscal officer may require any person or corporation performing such public work to file with the fiscal officer within ten days of receipt of said request, payroll records, sworn to as to their validity and accuracy, requested by the fiscal officer, for said public

work or for any public or private work performed by said person or corporation during the same period of time as said public work. In the event said person or corporation fails to provide the requested information within the allotted ten days, the fiscal officer shall, within fifteen days, order the department of jurisdiction to immediately withhold from payment to said person or corporation up to twenty-five percent of the amount, not to exceed one hundred thousand dollars, to be paid to said person or corporation under the terms of the contract pursuant to which said public work is being performed. Said amount withheld shall be immediately released upon receipt by the department of jurisdiction of a notice from the fiscal officer indicating that the request for records had been satisfied.

3-b. 1. Public work advisory board. There is hereby created in the department an advisory board on public work composed of six members to be appointed by the governor by and with the advice and consent of the senate. Two members of the advisory board shall be persons known to represent the interests of employers in the construction industry, two persons shall be known to represent the interest of employees therein, and two members shall be persons appointed to represent the public. The governor may remove any member when he or she ceases to represent the interests in whose behalf he or she was appointed. The commissioner of labor shall be an additional member of such board without any voting power and act as chairman thereof and shall designate an employee of the department to be secretary. The board shall meet at the call of the commissioner of labor and when engaged upon the work of the board each member, except the commissioner, shall not receive a salary or other compensation, but shall be reimbursed for reasonable

traveling and other expenses to be audited by the state comptroller.

2. Terms of office. All members of the advisory board shall be appointed for a term of six years to begin at the expiration of the term of office of the member whom he is to succeed. Any member appointed to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the unexpired term of the member whom he is to succeed.

3-c. The advisory board shall adopt rules and regulations to govern its own proceedings, and to expedite the making by it of the examinations and determinations required by this chapter. The members of the advisory board shall have power:

1. To issue subpoenas for and compel the attendance of witnesses and the production of books, contracts, papers, documents and other evidence;

2. To hear testimony and take or cause to be taken depositions of witnesses residing within or without this state in the manner prescribed by law for like depositions in civil actions in the supreme court. Subpoenas and commissions to take testimony shall be issued under the seal of the department.

3-d. The fiscal officer of any political subdivision of the state, wherein a public work project is proposed to be constructed, may request the industrial commissioner to make a classification by trades or occupations of laborers, workmen and mechanics required to perform the public work in its completed form. The board shall, when requested by the industrial commissioner, examine into proposed public work projects and determine the classification by trades or occupations of

laborers, workmen and mechanics required to perform the public work in its completed form; and to determine which of same are skilled, semi-skilled or unskilled. The board shall file with the industrial commissioner its findings, determinations and recommendations.

3-e. Apprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the New York State Department of Labor. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his work force on any job under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the New York State Department of Labor for the classification of work he actually performed. The contractor or subcontractor will be required to furnish written evidence of the registration of his program and apprentices as well as of the appropriate ratios and wage rates, for the area of construction prior to using any apprentices on the contract work.

4. This section shall not apply to:

a. Stationary firemen in state hospitals;

b. Other persons regularly employed in the state institutions, except mechanics;

c. Engineers, electricians and elevator men in the bureau of building management of the office of general services during the annual session of the legislature.

5. Definitions. a. The "prevailing rate of wage, " for the intents and purposes of this article, shall be the rate of

wage paid in the locality, as hereinafter defined, by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed. The prevailing rate of wage shall be annually determined in accordance herewith by the fiscal officer no later than thirty days prior to July first of each year, and the prevailing rate of wage for the period commencing July first of such year through June thirtieth, inclusive, of the following year shall be the rate of wage set forth in such collective bargaining agreements for the period commencing July first through June thirtieth, including those increases for such period which are directly ascertainable from such collective bargaining agreements by the fiscal officer in his annual determination. In the event that it is determined after a contest, as provided in subdivision six of this section, that less than thirty percent of the workers, laborers or mechanics in a particular trade or occupation in the locality where the work is being performed receive a collectively bargained rate of wage, then the average wage paid to such workers, laborers or mechanics in the same trade or occupation in the locality for the twelve-month period preceding the fiscal officer's annual determination shall be the prevailing rate of wage. Laborers, workers or mechanics for whom a prevailing rate of wage is to be determined shall not be considered in determining such prevailing wage.

b. "Supplements," for the intents and purposes of this article, means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not "wages" within

the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay life insurance, and apprenticeship training.

c. "Prevailing practices in the locality," for the intents and purposes of this article, shall be the practice of providing supplements, as hereinbefore defined, as provided by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality, as determined by the fiscal officer in accordance with the provisions herein.

With respect to each supplement determined to be one of the prevailing practices in the locality, the amount of such supplement shall be determined in the same manner and at the same times as the prevailing rate of wage is determined pursuant to this section.

d. "Locality" means such areas of the state described and defined for a trade or occupation in the current collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public and private work.

e. The "fiscal officer," as used herein, shall be deemed to be, on public work performed by or on behalf of the state or a public benefit corporation or a county or a village, or other civil division of the state, except a city, with a population in excess of one million, the commissioner of labor; and on public work performed by or on behalf of a city with a population in excess of one million, the comptroller or other analogous officer of such city.

f. The term "verified complaint," as applied to a claim against a municipality, shall include a verified demand or verified notice of claim heretofore, and since the first day of January, nineteen hundred thirty-five, filed with the fiscal officer of such municipality in accordance with the provisions of the local charter or local laws or ordinances relating generally to the filing of claims or demands against such municipality; and any person who has filed such a demand or notice shall be deemed to have filed a verified complaint as of the date, not earlier than the first day of January, nineteen hundred thirty-five, mentioned in such notice or demand as the commencement of the period in relation to which such claim or demand is made.

g. "Substantially owned-affiliated entity" shall mean the parent company of the contractor or subcontractor, any subsidiary of the contractor or subcontractor, or any entity in which the parent of the contractor or subcontractor owns more than fifty percent of the voting stock, or an entity in which one or more of the top five shareholders of the contractor or subcontractor individually or collectively also owns a controlling share of the voting stock, or an entity which exhibits any other indicia of control over the contractor or subcontractor or over which the contractor or subcontractor exhibits control, regardless of whether or not the controlling party or parties have any identifiable or documented ownership interest. Such indicia shall include, power or responsibility over employment decisions, access to and/or use of the relevant entity's assets or equipment, power or responsibility over contracts of the entity, responsibility for maintenance or submission of certified payroll records, and influence over the business decisions of the relevant entity.

h. "Entity" shall mean a partnership, association, joint venture, company, sole proprietorship, corporation or any other form of doing business.

i. "Parent company" shall mean an entity that directly controls the contractor or subcontractor.

j. "Subsidiary" shall mean an entity that is controlled directly, or indirectly through one or more intermediaries, by a contractor or subcontractor or by the contractor's parent company.

k. "Successor" shall mean an entity engaged in work substantially similar to that of the predecessor, where there is substantial continuity of operation with that of the predecessor.

6. The fiscal officer, may, and on the written request of any interested person shall, require any person or corporation performing such public work to file with such fiscal officer schedules of the supplements to be provided and wages to be paid to such laborers, workmen or mechanics. Any such person or corporation shall, within ten days after the receipt of written notice of such requirement, file with the fiscal officer such schedules of wages and supplements. An employer may contest a determination by the fiscal officer under paragraphs a and c of subdivision five of this section. The employer must allege and prove by competent evidence, that the actual percentage of workers, laborers or mechanics is below the required thirty per centum and during the pendency of any such contest and until final determination thereof, the work in question shall proceed under the rate established by the fiscal officer.

7. Compliance investigations. The fiscal officer as herein defined shall on a verified complaint in writing of any person interested or of any employee organization pursuant to subdivision eight-d, and may on his own initiative cause a compliance investigation to be made to determine whether the contractor or a subcontractor has paid the prevailing rate of wages and prevailing practices for supplements in the same trade or occupation in the locality within the state where such public work is being performed, or the hours of labor performed by the workmen, laborers and mechanics employed on such public work, or both. The fiscal officer or his agents, examiners and inspectors may examine or cause to be examined the books and records pertaining to the rate of wages paid and supplements provided to the laborers, workmen and mechanics on said public work and the hours of labor performed by such laborers, workmen and mechanics on said public work. The fiscal officer in such investigation shall be deemed to be acting in a judicial capacity, and shall have the right to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. Such fiscal officer shall make either an order, determination or any other disposition, including but not limited to an agreed upon settlement and/or stipulation, within six months from the date of filing of such verified complaint, and where a compliance investigation is made without the filing of a verified complaint, within six months from the date a compliance investigation is initiated by such fiscal officer. Upon the making of said order or determination, or upon arriving at such agreed upon settlement and/or stipulation, a copy thereof shall be sent by certified mail, return receipt requested, by the fiscal officer: (i) to the person and employee organization, if any, who or which initiated the complaint, (ii) to the person or corporation,

if any, against whom the complaint was brought, and (iii) where a compliance investigation is made without the filing of a complaint, to the person or corporation who or which was the subject of the compliance investigation.

7-a. The fiscal officer must make an inquiry as to the willfulness of the alleged violation which is the subject of a compliance investigation pursuant to subdivision seven of this section. In the event a formal hearing is held pursuant to subdivision eight of this section, the fiscal officer, upon a review of the entire record and a finding of credible evidence, must make a determination, as to the willfulness of said violation. No finding of willfulness made pursuant to the provisions of this subdivision shall be dispositive for the purposes of section one hundred ninety-eight-a of this chapter or of the last undesignated paragraph of subdivision three of this section.

8. Hearings. Before issuing an order or determination as provided in subdivision seven, the fiscal officer shall order a hearing thereon at a time and place to be specified, and shall give notice thereof, together with a copy of such complaint or the purpose thereof, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on any person or corporation affected thereby; such person or corporation shall have an opportunity to be heard in respect to the matters complained of at the time and place specified in such notice, which time shall be not less than five days from the service of the notice personally or by mail. The fiscal officer in such hearing shall be deemed to be acting in a judicial capacity, and shall have the right to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil

practice law and rules. Such hearing shall be expeditiously conducted and upon such hearing the fiscal officer shall determine the issues raised thereon and shall make and file an order in the office of the fiscal officer stating such determination, and forthwith serve a copy of such order, with a notice of the filing thereof, upon the parties to such proceeding, personally or by mail. Such order shall direct payment of wages or supplements found to be due, including interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment, provided, however, that such interest rate shall not apply to subdivision eight-c of this section.

In addition to directing payment of wages or supplements including interest found to be due, such order may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due. In assessing the amount of the penalty, due consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and the failure to comply with recordkeeping or other non-wage requirements. Where the fiscal officer is the commissioner, the penalty shall be paid to the commissioner for deposit in the state treasury. Where the fiscal officer is a city comptroller or other analogous officer, the penalty shall be paid to said officer for deposit in the city treasury.

Upon the entry of such order any party aggrieved thereby may commence proceeding for the review thereof pursuant to article seventy-eight of the civil practice law and rules within thirty days from the notice of the filing of the said order in the office of the fiscal

officer. Said proceeding shall be commenced directly in the appellate division of the supreme court. If such order is not reviewed, or is so reviewed and the final decision is in favor of the complainant and the order involves or relates to the rate of wages paid or the supplements provided on such public work, the complainant or any other person affected may within six months after the service of notice of the filing of said order, or the notice of entry of said final decision on review, institute an action against the person or corporation found violating this act for the recovery of the difference between the sum actually paid or provided and the amount which should have been paid or provided, together with interest at the rate of interest provided herein, as determined by said order or decision, as the case may be, from and after the date of the filing of said verified complaint, with the fiscal officer or of the filing of the fiscal officer's report of investigation made on his own initiative. Provided that no proceeding for judicial review as provided herein shall then be pending and the time for initiation of such proceeding shall have expired, the fiscal officer may file with the county clerk of the county where the employer resides or has a place of business the order of the fiscal officer containing the amount found to be due. The filing of such order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order may be enforced by and in the name of the fiscal officer in the same manner, and with like effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment.

8-a. Notwithstanding any inconsistent provision of this chapter or of any other general, special or local law, ordinance, charter or administrative code, the prior receipt without protest of the wages, salary or supplements paid or provided, as the case may be, to the

complainant or any other person affected by such final order, or his failure to state orally or in writing upon any payroll or receipt which he is required to sign that the wages, salary or supplements received by him is received under protest, or to indicate in any other way his protest against the amount thereof, or that the amount so paid does not constitute payment in full of the wages or salary due him for the period covered by such payment, or that the supplements provided do not constitute the full supplements due him, shall not be a bar to his right to recover, in accordance with the provisions of subdivision eight, the difference between the sum actually paid or provided, as the case may be, and the amount which should have been paid or provided, as the case may be, as determined by such final order.

8-b. Notwithstanding any inconsistent provision of this chapter or of any other general, special or local law, ordinance, charter or administrative code, an employee of a municipal corporation, irrespective of the title of his position or employment, whose salary or wage or supplement is fixed by reference to a prevailing rate of wage determined or to a prevailing practice for supplements determination and established by a final order in a proceeding instituted under this section, shall not be barred from his right to recover, in accordance with the terms of such fixation, the difference between the amount actually paid to him and the amount which should have been paid to him or provided, as the case may be, pursuant to such fixation, because of the prior receipt by him without protest of the salary, wages or supplements paid or provided to him, as the case may be; or because he did not previously protest his prior failure to be provided with any supplement whatsoever; or on account of his failure to state orally or in writing upon any payroll or receipt which he is required to sign

that the salary or wages or supplements received by him is received under protest, or on account of his failure to indicate his protest against the amount or non-provision thereof or that the amount so paid or provided does not constitute payment or provision, as the case may be, in full of the salary, wages or supplement due him for the period covered by such payment.

8-c. Interest at six percentum per annum shall begin to accrue sixty days after a final determination made by a fiscal officer on the difference between the prevailing wages so determined, and which should have been paid to an employee of a municipal corporation, and the amount actually received by him. Said accumulated interest shall be paid to the employee when back pay based on the determination is paid to him.

8-d. Notwithstanding any inconsistent provision of this chapter or of any other law, in a city of one million or more, where a majority of laborers, workmen or mechanics in a particular civil service title are members of an employee organization which has been certified or recognized to represent them pursuant to the provisions of article fourteen of the civil service law or a local law enacted thereunder, the public employer and such employee organization shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements of the laborers, workmen or mechanics in the title. If the parties fail to achieve an agreement, only the employee organization shall be authorized to file a single verified complaint pursuant to subdivision seven herein, on behalf of the laborers, workmen or mechanics so represented. Such employee organization shall be the sole and exclusive representative of such laborers, workmen or mechanics at any hearing pursuant to subdivision eight herein, and shall be the sole complainant in the proceeding for all

purposes therein, including review pursuant to article seventy-eight of the civil practice law and rules. Service by the fiscal officer on the employee organization shall be sufficient notice to the laborers, workmen or mechanics so represented for all purposes of subdivision eight herein, except that the issuance and enforcement of subpoenas shall be regulated by the civil practice law and rules. Any order, compromise, or settlement determining the issues raised upon such a proceeding, which has not been taken up for review by the employee organization, shall be binding upon the laborers, workmen or mechanics represented by the employee organization. Nothing herein shall be construed to limit the rights of any laborer, workman or mechanic who has on file a verified complaint prior to the effective date of this subdivision.

9. When a final determination has been rendered, any person, or corporation that willfully refuses thereafter to pay the rate of wages or to provide the supplements determined to be prevailing, or willfully employs on such public work, laborers, workmen or mechanics more than the hours per day determined by said order until modified by order of the fiscal officer or court and thereby violates the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished, for a first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited; and no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state or of a municipal corporation pay the same or authorize its payment from the funds under his charge or control to any such person or corporation for work done upon any

contract, on which the contractor has been convicted of second offense in violation of the provisions of this section.

FOOTNOTES

[FN1] Now commissioner of labor.

[FN2] So in original. A comma should probably be inserted.

220-b. Amounts due for wages and supplements may be withheld for benefit of laborers.

1. In case any interested person shall have previously filed a protest in writing objecting to the payment to any contractor or subcontractor to the extent of the amount or amounts due or to become due to him for daily or weekly wages or supplements for labor performed on the public improvement for which such contract was entered into, or if for any other reason it may be deemed advisable, the comptroller of the state or the financial officer of the municipal corporation or other officer or person charged with the custody and disbursement of the state or corporate funds applicable to the contract for such public improvement may deduct from the whole amount of any payment on account thereof the sum or sums admitted by any contractor or subcontractor in such statement or statements so filed to be due and owing by him on account of labor performed on such public improvement before making payment of the amount certified for payment in any estimate or voucher, and may withhold the amount so deducted for the benefit of the laborers, workmen or mechanics whose wages or supplements are unpaid or not provided, as the case may be, as shown by the verified statements filed by any contractor or subcontractor, and may pay directly to any person the amount or amounts shown to be due to him or his duly authorized collective bargaining labor organization, as the case may be, for such wages or supplements by the statements filed as hereinbefore required, thereby discharging the obligation of the contractor or subcontractor to the person or his duly authorized collective bargaining labor organization receiving such payment to the extent of the amount thereof, or

2. a. (1) When any interested person shall file a written complaint with the fiscal officer, as herein defined, alleging unpaid wages or supplements due for labor performed on a public improvement for which a contract has been entered into, and said labor is alleged to have been performed within the two-year period immediately preceding the date of the filing of said complaint, or if, on the fiscal officer's own initiative, unpaid wages or supplements appear to be due, the fiscal officer shall immediately so notify the financial officer of the civil division interested, or, if there are insufficient moneys still due to the contractor or subcontractor to satisfy said wages and supplements, including interest and penalty, the financial officer of another civil division which has entered or subsequently enters into a public improvement contract with the contractor or subcontractor, who shall withhold from any payment due or earned the contractor or subcontractor executing any public improvements, sufficient moneys to satisfy said wages and supplements, including interest at the rate provided herein, and any civil penalty that may be assessed as provided herein, pending a final determination. The financial officer shall immediately confirm in writing to the fiscal officer the amount of money withheld.

(2) If there are still insufficient moneys due or earned to the contractor or subcontractor, as a result of work performed, to satisfy such wages and supplements, including interest and penalties, the financial officer shall immediately notify the fiscal officer, who may issue a notice of intent to withhold any of the following:

(i) any substantially-owned affiliated entity or any successor or subsidiary of the contractor or subcontractor;

(ii) any of the partners, if the contractor or subcontractor is a partnership, or any of the five largest shareholders of the contractor or subcontractor, as determined by the fiscal officer; or

(iii) any officer of the contractor or subcontractor who knowingly participated in the violation of this article.

(3) The notice of intent to withhold shall provide that the fiscal officer intends to instruct the financial officer, not less than ten days following service of the notice by mail, to withhold sufficient moneys to satisfy unpaid wages and supplements, including interest at the rate provided in this article, and any civil penalty that may be assessed as provided in this article, from any payment due or earned the notified party under any public improvement contract pending final determination. The notice of withholding shall provide that within thirty days following the date of the notice of withholding the notified party may contest the withholding on the basis that the notified party is not a partner or top five shareholder of the subcontractor or contractor, an officer of the contractor or subcontractor who knowingly participated in the violation of this article, a substantially-owned affiliated entity, or successor. If the notified party fails to contest the notice of withholding, or if the fiscal officer, after reviewing the information provided by the notified party in such contest, determines that the notified party is a partner or top five shareholder, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, or a substantially-owned affiliated entity, or successor, the fiscal officer may instruct the financial officer to withhold sufficient moneys to satisfy said wages and supplements, including interest at the rate provided in this article, and any civil penalty that may be assessed as provided in

this article from any payment due the notified party under any public improvement contract pending the final determination.

(4) The financial officer shall immediately implement the notice of withholding and confirm in writing to the fiscal officer the amount of money to be withheld. If the notified party contests the withholding after a withholding has been effected, and if the fiscal officer determines, that the notified party is not a partner or top five shareholder, an officer of the contractor or subcontractor who knowingly participated in the violation of this article, or a substantially-owned affiliated entity or successor, the fiscal officer shall immediately notify the financial officer to release all payments being withheld from the notified party and the financial officer shall implement the notice.

b. Moneys withheld pursuant to this section shall be held by the financial officer for the sole and exclusive benefit of the workers employed on said public improvement and for payment of any civil penalty that may be assessed as provided herein and shall not be used for any other purpose except upon court order. Any person, partnership, association, corporation or governmental body who files a lien or commences a judicial proceeding with respect to any monies withheld pursuant to this section shall notify the fiscal officer in writing of the lien or claim on or before the date of filing of the lien or commencement of the judicial proceeding. In any proceeding to obtain moneys withheld pursuant to this section by any person, partnership, association, corporation or governmental body, the fiscal officer shall have the right to appear and be heard.

c. The fiscal officer shall cause an investigation to be made to determine whether any amounts are due to the

laborers, workmen or mechanics, or on their respective behalves, on such public improvement, for labor performed after the commencement of the three-year period immediately preceding the filing of the complaint or the commencement of the investigation on his own initiative, as the case may be, and shall order a hearing thereon at a time and place to be specified and shall give notice thereof, together with a copy of such complaint, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on all interested persons, including the person complained against and upon the financial officer of the civil division interested; such person complained against shall have an opportunity to be heard in respect to the matters complained of, at the time and place specified in such notice, which time shall be not less than five days from the service of said notice. The fiscal officer in such an investigation shall be deemed to be acting in a judicial capacity and shall have the rights to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. Such investigation and hearing shall be expeditiously conducted, and upon such hearing and investigation, the fiscal officer shall determine the issues raised thereon and shall make and file an order in his office stating such determination and forthwith serve a copy of such order, either personally or by mail, together with notice of filing, upon the financial officer of the civil division interested, and the parties to such proceedings and, if the fiscal officer be the comptroller or other analogous officer of a city, upon the commissioner. Such order shall direct payment of wages or supplements found to be due, including interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a

of the banking law per annum from the date of the underpayment to the date of the payment.

d. In addition to directing payment of wages or supplements including interest found to be due, the order of the fiscal officer may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due. In assessing the amount of the penalty, due consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations of the employer or any successor or substantially-owned affiliated entity or any of the partners if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, as determined by the fiscal officer, and any officer of the contractor or subcontractor who knowingly participated in the violation of this article, and the failure to comply with recordkeeping or other non-wage requirements. Upon the fiscal officer's determination of the penalty, where the fiscal officer is the commissioner, the penalty shall be paid to the commissioner for deposit in the state treasury. Where the fiscal officer is a city comptroller or other analogous officer, the penalty shall be paid to said officer for deposit in the city treasury.

e. Upon the entry and service of such order, the financial officer of the civil division interested shall pay to the claimant, from the moneys due to the contractor or subcontractor, the amount of the claim as determined by the fiscal officer and the amount of the civil penalty, if any, shall be paid as provided herein, provided that no proceeding pursuant to article seventy-eight of the civil practice law and rules for review of said order is commenced by any party aggrieved thereby within thirty days from the date said order was filed in the office of

the fiscal officer. Said proceeding shall be commenced directly in the appellate division of the supreme court. Where the fiscal officer is the commissioner, the civil penalty shall be paid to the commissioner for deposit in the state treasury; where the fiscal officer is a city comptroller or other analogous officer, the penalty shall be paid to said officer for deposit in the city treasury. In the event that such a proceeding for review is instituted, moneys sufficient to satisfy the claim and civil penalty shall be set aside by the financial officer interested as provided in paragraph b of this subdivision, subject to the order of the court.

f. If the financial officer of the civil division interested fails to pay to the claimant the amount of the claim as determined by the fiscal officer within ten days after the expiration of the contractor's time to commence a proceeding for review of the fiscal officer's order or, if such a proceeding has been commenced, within ten days after entry and service of a court order confirming the fiscal officer's order, the civil division interested shall pay to the claimant interest on the claim at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law from the date the financial officer was required to pay the claim as provided herein to the date of payment; provided, however, this paragraph shall not apply if the failure of the financial officer of the civil division interested to pay the amount of the claim is pursuant to court order.

g. When a final determination has been made in favor of a complainant and the contractor or subcontractor found violating this article has failed to make payment as required by the order of the fiscal officer, and provided that no relevant proceeding for judicial review shall then be pending and the time for initiation of such

proceeding shall have expired, the fiscal officer may file a copy of the order of the fiscal officer containing the amount found to be due with the county clerk of the county of residence or place of business of any of the following:

(i) any substantially-owned affiliated entity or any successor of the contractor or subcontractor;

(ii) any of the partners if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, as determined by the fiscal officer; or

(iii) any officer of the contractor or subcontractor who knowingly participated in the violation of this article; provided, however, that the fiscal officer shall within five days of the filing of the order provide notice thereof to the partner or top five shareholders or successor or substantially-owned affiliated entity or other entity determined to have violated any provision of subdivision five of section two hundred twenty of this article or this subdivision; the notified party may contest the filing on the basis that it is not a partner or top five shareholder, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, or successor or substantially-owned affiliated entity. If, after reviewing the information provided by the notified party in support of such contest, the fiscal officer determines that the notified party is not subject to the provision of this paragraph, the fiscal officer shall immediately withdraw his filing of the order.

The filing of such order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order may be enforced by and in the name of the fiscal officer in the same manner, and with like

effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment.

h. When a final determination has been made against a subcontractor in favor of a complainant and the contractor has made payment to the complainant of any wages and interest due the complainant and any civil penalty that has been assessed, and providing that no relevant proceeding for judicial review shall then be pending and the time for initiation of such proceeding shall have expired, the contractor may file a copy of the order of the fiscal officer containing the amount found to be due with the county clerk of the county of residence or place of business of the subcontractor. The filing of such order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The judgment may be docketed in favor of the contractor who may proceed as a judgment creditor against the subcontractor for the recovery of all monies paid by the contractor under such order.

Provided that no proceeding for judicial review shall then be pending and the time for initiation of such proceeding shall have expired, the commissioner may file with the county clerk of the county where the employer resides or has a place of business the order of the fiscal officer containing the amount found to be due. The filing of such an order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order may be enforced by and in the name of the commissioner in the same manner, and with like effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment.

2-a. The fiscal officer shall make an inquiry as to the willfulness of the alleged violation which is the subject of an investigation pursuant to subdivision two of this

section. In the event a formal hearing is held pursuant to this section, the fiscal officer, upon a review of the entire record and a finding of credible evidence, must make a determination, as to the willfulness of such violation. No finding of willfulness made pursuant to the provisions of this subdivision shall be dispositive for the purposes of section one hundred ninety-eight-a of this chapter or of the last undesignated paragraph of subdivision three of section two hundred twenty of this article.

3. a. When a final determination has been made and such determination is in favor of the complainant, said complainant may in addition to any other remedy provided by this article, institute an action in any court of appropriate jurisdiction against the person or corporation found violating this article, any substantially-owned affiliated entity or any successor of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, and any of the partners if the contractor or subcontractor is a partnership or any of the five largest shareholders of the contractor or subcontractor, as determined by the fiscal officer, for the recovery of the difference between the sum, if any, actually paid to him by the aforesaid financial officer pursuant to said order and the amount found to be due him as determined by said order. Such action must be commenced within three years from the date of the filing of said order, or if the said order is reviewed in a proceeding pursuant to article seventy-eight of the civil practice law and rules, within three years after the termination of such review proceeding.

b. (1) When two final determinations have been rendered against a contractor, subcontractor, successor, or any substantially-owned affiliated entity of the

contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership, any officer of the contractor or subcontractor who knowingly participated in the violation of this article, any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor or any successor within any consecutive six-year period determining that such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article has willfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor, subcontractor, successor, or any substantially-owned affiliated entity of the contractor or subcontractor, any of the partners if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor, subcontractor, successor, or any substantially-owned affiliated entity of the

contractor or subcontractor, any partner if the contractor or subcontractor is a partnership or any of the shareholders who own or control at least ten per centum of the outstanding stock of the contractor or subcontractor, any officer of the contractor or subcontractor who knowingly participated in the violation of this article shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination.

(2) When any person or corporation, or any officer or shareholder who owns or controls at least ten per centum of the outstanding stock of such corporation, has been convicted of a felony offense for conduct directly relating to obtaining or attempting to obtain, or performing or attempting to perform a public work contract with the state, any municipal corporation, public benefit corporation or public body, and such felony offense is a violation of:

(i) this article or article six of this chapter;

(ii) coercion in the first degree as defined in section 135.65 of the penal law, grand larceny in the fourth degree as defined in section 155.30 of the penal law, grand larceny in the third degree as defined in section 155.35 of the penal law, grand larceny in the second degree as defined in section 155.40 of the penal law, grand larceny in the first degree as defined in section 155.42 of the penal law, forgery in the second degree as defined in section 170.10 of the penal law, forgery in the first degree as defined in section 170.15 of the penal law, criminal possession of a forged instrument in the second degree as defined in section 170.25 of the penal law, criminal possession of a forged instrument in the first degree as defined in section 170.30 of the penal law,

criminal possession of forgery devices as defined in section 170.40 of the penal law, falsifying business records in the first degree as defined in section 175.10 of the penal law, tampering with public records in the first degree as defined in section 175.25 of the penal law, offering a false instrument for filing in the first degree as defined in section 175.35 of the penal law, issuing a false certificate as defined in section 175.40 of the penal law, insurance fraud in the fourth degree as defined in section 176.15 of the penal law, insurance fraud in the third degree as defined in section 176.20 of the penal law, insurance fraud in the second degree as defined in section 176.25 of the penal law, insurance fraud in the first degree as defined in section 176.30 of the penal law, aggravated insurance fraud as defined in section 176.35 of the penal law, commercial bribing in the first degree as defined in section 180.03 of the penal law, commercial bribe receiving in the first degree as defined in section 180.08 of the penal law, bribing a labor official as defined in section 180.15 of the penal law, bribe receiving by a labor official as defined in section 180.25 of the penal law, criminal impersonation in the second degree as defined in section 190.25 of the penal law, criminal impersonation in the first degree as defined in section 190.26 of the penal law, criminal usury in the second degree as defined in section 190.40 of the penal law, criminal usury in the first degree as defined in section 190.42 of the penal law, scheme to defraud in the first degree as defined in section 190.65 of the penal law, bribery in the third degree as defined in section 200.00 of the penal law, bribery in the second degree as defined in section 200.03 of the penal law, bribery in the first degree as defined in section 200.04 of the penal law, bribe receiving in the third degree as defined in section 200.10 of the penal law, bribe receiving in the second degree as defined in section 200.11 of the penal law, bribe receiving in the first degree as defined in section

200.12 of the penal law, rewarding official misconduct in the second degree as defined in section 200.20 of the penal law, rewarding official misconduct in the first degree as defined in section 200.22 of the penal law, bribe giving for public office as defined in section 200.45 of the penal law, or the attempted commission of any of the offenses set forth in this paragraph, provided that such offense constitutes a felony;

(iii) criminal solicitation in the second degree as defined in section 100.10 of the penal law, conspiracy in the fourth degree as defined in section 105.10 of the penal law, conspiracy in the second degree as defined in section 105.15 of the penal law, or criminal facilitation in the second degree as defined in section 115.05 of the penal law, provided that such offense is a felony and was committed in connection with one or more of the crimes listed in clause (ii) of this subparagraph;

(iv) article twenty-two of the general business law;

(v) assault in the second degree as defined in section 120.05 of the penal law, assault in the first degree as defined in section 120.10 of the penal law, reckless endangerment in the first degree as defined in section 120.25 of the penal law, criminally negligent homicide as defined in section 125.10 of the penal law, manslaughter in the second degree as defined in section 125.15 of the penal law, manslaughter in the first degree as defined in section 125.20 of the penal law and murder in the second degree as defined in section 125.25 of the penal law, provided that the victim was an employee of such person or corporation and further provided that such offense arose from actions or matters related to the protection of the health or safety of employees at a work site; such person or corporation shall be ineligible to submit a bid on or be awarded any public works

contract with the state, any municipal corporation, public benefit corporation or public body for a period of five years from the date of conviction.

c. Nothing in this subdivision shall be construed as affecting any provision of any other law or regulation relating to the awarding of public contracts.

FOOTNOTES

[FN1] So in original. Probably